Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FLUOR DANIEL, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's interpretation of the respective burdens of proof in a failure-to-hire case conflicts with the standards announced by other Circuit Courts of Appeals.
2. Whether the Sixth Circuit's interpretation of the respective burdens of proof in a failure-to-hire case deprived Fluor Daniel of due process of law.
3. Whether the Sixth Circuit's interpretation of the respective burdens of proof in a failure-to-hire case conflicts with its own precedent and with this Court's precedent.
4. Whether the NLRB's interpretation of the respective burdens of proof in a failure-to-hire case conflicts with the Sixth Circuit precedent and with this Court's precedent.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Fluor Daniel, Inc., a Delaware corporation. Fluor Daniel, Inc. is a wholly-owned subsidiary of Fluor Corporation, a Delaware corporation. No publicly held company owns ten percent or more of the Petitioner.

Respondent is the National Labor Relations Board. Intervenors in the appeal below are the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO; International Brotherhood of Electrical Workers, Local Union No. 995, AFL-CIO; and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Steamfitters Local Union No. 198, AFL-CIO.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
REASONS FOR GRANTING THE WRIT	11
I. THE SIXTH CIRCUIT DECISION CONFLICTS WITH SUPREME COURT PRECEDENT	11
II. THE SIXTH CIRCUIT DECISION EXEMPLIFIES THE CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS	12
III. *FLUOR DANIEL II* ACCURATELY REFLECTS THE STANDARD REQUIRED BY SUPREME COURT PRECEDENT	13
IV. THE NLRB'S GENERAL COUNSEL CANNOT SATISFY HIS BURDEN OF PROOF WHEN HE MAKES NO ATTEMPT TO MATCH APPLICANTS WITH SPECIFIC JOB OPENINGS	16

TABLE OF CONTENTS—Continued

Page

V. THE BOARD'S FAILURE TO MATCH APPLICANTS WITH SPECIFIC JOB OPENINGS DEPRIVES FLUOR DANIEL OF DUE PROCESS OF LAW 20

CONCLUSION 21

Appendix A—Sixth Circuit Opinion 6/9/03 ..... 1a

Appendix B—NLRB Decision and Order 4/2/01 ..... 26a

Appendix C—Sixth Circuit Order Denying Rehearing & Rehearing *En Banc* 6/10/04 ..... 123a

Appendix D—Sixth Circuit Judgment 3/1/04 ..... 124a

TABLE OF AUTHORITIES

CASES — Page

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)..... 15

NLRB v. Transportation Management Corp., 462 U.S. 393, 402-03, 103 Sup. Ct. 2469, 76 L.Ed.2d 667 (1983)..... 11, 13

Fluor Daniel v. NLRB, 161 F.3d 953 (6th Cir. 1998) (*Fluor Daniel II*)..... *passim*

Fluor Daniel, 332 F.3d 961 (6th Cir. 2003)..... *passim*

Starcon, Inc. v. NLRB, 176 F.3d 948 (7th Cir. 1999)..... 13

Ultrasystems Western Constructors v. NLRB, 18 F.3d 251 (4th Cir. 1994)..... 12

FES (A Division of Thermo Power), 331 N.L.R.B. 9 (2000)..... 10, 12, 14

Ippli, Inc., 321 N.L.R.B. 463 (1996)..... 5

Wright Line, 251 N.L.R.B. 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 102 Sup. Ct. 1612, 71 L.Ed.2d 848 (1982)..... 9

STATUTES

28 U.S.C. § 1254(1)..... 2

29 U.S.C. §§ 158(a)(1) and (3) (1998)..... 2

42 U.S.C. § 2000(e), *et seq.*..... 15

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Fluor Daniel, Inc., respectfully petitions for a writ of *certiorari* to review the judgment of the Court of Appeals for the Sixth Circuit ("the Sixth Circuit").

OPINION BELOW

The opinion of the Sixth Circuit is reported at 332 F.3d 961 (6th Cir. 2003) and reproduced in Petitioner's Appendix (hereinafter "App.") at 1a-25a. The order denying rehearing *en banc* is reported at 2004 U.S. App. LEXIS 11740 (6th Cir., June 10, 2004) and is reproduced in App. at 123a.

JURISDICTION

Judgment of the Sixth Circuit was entered on March 1, 2004, and the order denying panel rehearing and denying

rehearing *en banc* issued on June 10, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. §§ 158(a)(1) and (3) (1998) of the Labor Laws of the United States provide as follows:

> (a) Unfair labor practices by employer.
>
> It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this Title;
>
> . . .
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

STATEMENT OF THE CASE

The Proceedings Below

This case arises out of allegations that in 1994 Fluor Daniel, Inc. (Fluor Daniel) at separate job sites in Baton Rouge, Louisiana ("Exxon") and Palo Verde, Arizona ("APS") committed unfair labor practices by refusing to hire approximately 119 voluntary union organizers to work on those job sites. These individuals filed complaints with the National Labor Relations Board. The Regional Directors of the Board issued complaints in Baton Rouge on March 29, 1995 and in Phoenix on April 17, 1995. On April 12, 1995, the General Counsel of the Board ordered consolidation of these charges.

An Administrative Law Judge (ALJ) held 51 days of hearings in Phoenix and Baton Rouge between August 1, 1995 and December 12, 1996. The ALJ issued his decision

on February 6, 1998, finding that Fluor Daniel had violated the Act by unlawfully discriminating against 40 job applicants at Baton Rouge and 79 at Palo Verde.

Relevant to the issues raised in this Petition, the ALJ determined that there were jobs available in which these alleged discriminatees could be hired based on his finding that "from the time Respondent began hiring craftsmen at Palo Verde in June 1994 until February 1996, Respondent hired 962 craftsmen. There were more than enough jobs for all the discriminatees to be hired into their craft." App. at 97a. Regarding Exxon, the ALJ found that Fluor Daniel hired "2800 people to do the job" between January and December 1994. App. at 103a. Based on these findings, the ALJ determined that the Board's General Counsel had satisfied its burden to show the availability of jobs and that the burden of proof then shifted to Fluor Daniel to establish why these individuals were not hired. The ALJ issued his decision on February 6, 1998, determining that Fluor Daniel had failed to satisfy its burden and that it had violated the Act.

Fluor Daniel petitioned for review to the NLRB, asserting numerous bases of appeal, including the position that the General Counsel had failed to satisfy his burden by failing to match each alleged discriminatee with an available job that he or she was qualified to perform. Fluor Daniel specifically relied on the 6th Circuit's decision in *Fluor Daniel v. NLRB*, 161 F.3d 953 (sixth Cir. 1998) (*Fluor Daniel II*). The Board rejected this argument, holding that the General Counsel had satisfied his burden because of the number of jobs available during the life of the two projects. App. at 66a. The NLRB issued a Decision and Order on March 2, 2001 affirming the rulings, findings of fact, and conclusions of law of the ALJ.[1]

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[1] The Board did modify the ALJ Opinion in certain respects, which are not relevant to this Petition.

On March 12, 2001, Fluor Daniel filed a Petition for Review of the NLRB's decision to the United States Court of Appeals for the Sixth Circuit. The NLRB filed its Application for Enforcement on March 29, 2001.

On June 9, 2003, the Court granted the NLRB's cross-petition for enforcement with a minor exception which is not relevant to this Petition. Based on that exception, however, the Court requested that the NLRB submit a proposed judgment that complied with the Court's opinion. The NLRB submitted a proposed judgment and Fluor Daniel objected to that proposed judgment. The Court ultimately entered a modified judgment on March 1, 2004. App. at 124a. Fluor Daniel petitioned for rehearing and rehearing *en banc* on March 15, 2004. The Court denied the petition for rehearing and rehearing *en banc* on June 10, 2004. App. at 123a.

STATEMENT OF THE FACTS

General Background

Fluor Daniel is one of the largest construction contractors in the United States. It provides construction, engineering, maintenance, and other services to customers all over the world.

These cases concern the "salting activities" of the various unions involved. The goals of salting campaigns are widely recognized as follows:

1. To put union members on a job site so as to enable the Union to organize the Company's employees in order to gain recognition either voluntarily or through a Board election.

2. To get union people on the job and create enough trouble by way of strikes, lawsuits, unfair labor practice charges and general tumult, so that the non-union contractor walks away from the job.

3. If number 2 does not work, to create enough problems for the employer by way of unfair labor practice charges, Davis Bacon, OSHA, or legal allegations requiring legal services so that even if the employer does not walk away from the job, he will be reluctant to bid for similar work in the area again.

Ippli, Inc., 321 N.L.R.B. 463, 465 (1996). In the present case, the unions have opted for course #3.

Palo Verde Project

Arizona Public Service (APS) operated the largest nuclear power generating plant in the United States. Bechtel Corporation, a unionized construction company, had done the initial construction and most of the subsequent maintenance, including serving as primary maintenance contractor. Because of performance problems, in 1993, APS elected to seek bids for future maintenance, including work done during scheduled outages.

APS awarded Fluor Daniel the Palo Verde contract. When Fluor Daniel began hiring for the Palo Verde project, it applied its typical hiring practices and preferences subject to the needs identified by APS. Since the construction labor market is broad and fluid, Fluor Daniel generally limits the time which it considers an application active to 60 days.

Fluor Daniel hired 91of the 200 former Bechtel employees who applied. Based on the contract labor requests issued by APS, Fluor Daniel was authorized to hire 111 employees in its base crew, the crew that worked generally year-round providing ongoing maintenance services. The Fluor Daniel base crew was smaller than Bechtel's and had a different mix of crafts; Fluor Daniel's base crew centered around the civil crafts (carpenters and laborers), rather than metal trades or mechanical crafts (such as welders, pipefitters, millwrights, boilermakers, and mechanics). Its base crew included 75 carpenters and laborers and only two pipefitters

and one plumber. There were no ironworkers, millwrights, or boilermakers.[2]

Between the persons identified from its database and the applicants from the general public, Fluor Daniel believed that it had filled its initial base crew needs from the prequalified invitees. On June 16, 20, and 23, Boilermaker organizer Gary Evenson led large groups of mechanical craft applicants (consisting of nineteen boilermakers, six ironworkers, twenty-one millwrights, two asbestos workers, one electrician, and one insulator) to the job site. They displayed union insignia, and listed "volunteer union organizer" on their applications. Their applications were accepted, but, as explained above, there was no need for these crafts in the initial Fluor Daniel base crew.

June 27, 1994 was the hire-in date and most of the previously recruited employees were reporting to the site for processing and orientation. Evenson called that morning, not identifying himself as a union member, and was told Fluor Daniel was not taking applications. Nonetheless, he then led 25 individuals to the Fluor Daniel trailer at the site to submit applications. Evenson ignored the sign on the trailer indicating that Fluor Daniel was not accepting applications and asked Dean Hamrick, the company recruiter, why no applications were being taken. Hamrick explained that they were busy processing the base crew and that they would post a sign showing whatever employees were needed in the future, or that they could call back and check to see whether applications were being accepted.

For these reasons, the Company did not accept applications from the uninvited arrivals at the job site on June 27. On June 28, after identifying the no-shows from the pre-qualified invitees, Fluor Daniel realized that it needed eleven more

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[2] Of the 111 employees hired for the base crew, 48 were former Bechtel employees.

carpenters, seven utility employees, and one HVAC employee. It reopened applications for those crafts, as well as recruiting from its historical workforce.

The anticipated fall outage of 1994, which would have required significant mechanical craftsmen (welders, millwrights, pipefitters) was postponed until early 1995. Therefore Fluor Daniel performed no outages in 1994.

In general, as explained above, Fluor Daniel applications are valid for only 60 days. If an applicant is not hired within that time frame and wishes to be considered for future openings, he or she must return and complete a new application. On the Palo Verde project, the applications clearly reflected that they were valid for only 60 days. On that project, nuclear power unit outages were generally anticipated in advance and interested candidates, especially those who had previously worked on the project, could have predicted when their services might have been needed. In fact, applicants who did return to the site to submit new applications after their original applications expired were hired.

Following its practices enabled Fluor Daniel to achieve the goals it had set when it bid on the project with APS, reducing the staffing and shortening the outages. In fact, the November 4, 1996 outage took only 39 days, the shortest nuclear unit outage ever at APS.

Exxon Project

In 1993, the East Coker unit of an Exxon refinery in Baton Rouge, Louisiana was destroyed by a fire. Exxon contracted with Fluor Daniel to rebuild the unit for completion by July 1994. Because of the urgent nature of the project and the lack of advance notice and preparation time, Fluor Daniel kept applications active for only 30 days instead of the normal 60.

From December 1993 to February 1994, the work on the Exxon project was primarily civil in nature and there was

minimal need for mechanical craftsmen and electricians. It was anticipated, however, that, when the work progressed beyond the foundation stages, there would be a rapid need for a number of employees from a variety of crafts. Human Resources Manager Bill Austin wanted to be prepared for what he expected would be a need for employees from various crafts and decided to accept applications from the public for these crafts, even though Fluor Daniel had not exhausted its internal database resources for employees in these classifications and the company was not yet hiring for any of these positions. Thus, in January 1994, these positions were posted in the office.

Prospective applicants inundated the office and overwhelmed the small human resources staff. These groups included a number of union members, many of whom went to the project at the suggestion of union organizers such as Ricky Russell. Even though Russell knew that the electrical work on the project would not begin until August, he led a group of electricians to the site where they completed applications on January 19, 1994. Austin explained that the applications would only be considered valid for 30 days and explained the hiring procedure and preferences Fluor Daniel would use. None of these electricians were Fluor Daniel experienced or certified, and eight of the ten indicated on their applications that they were union members. Additional groups of union members applied at various times between January 25 and August 30. Many of these applicants were electricians, but the groups also included pipefitters and boilermakers.

These applicants were considered according to Fluor Daniel's standard hiring protocol, with preferences being given to those with Fluor Daniel certification or experience and applications being kept active for the 30-day time period. Fluor Daniel's hiring decisions at Exxon were based exclusively on its need (as reflected by craft requisitions

forwarded by craft superintendents) and the neutral hiring preferences and policies. The alleged discriminatees were treated the same as all other applicants.

The ALJ and NLRB Decision

The clear message of the General Counsel and unions, ultimately adopted by the ALJ and NLRB, was that Fluor Daniel had to be punished for desiring to operate on an open shop basis. Every possible inference, regardless of a lack of justification, was taken against the company on the issue of anti-union animus. Against that background the ALJ and NLRB then allowed the General Counsel to by pass his burden of identifying and challenging specific hiring decisions. Rather, he has purported to satisfy his burden by the broad-brush allegation that enough individuals were hired during the life of these jobs to cover all of them. As there was no way to defend against such an improper premise, the ALJ and Board found that Fluor Daniel had violated the Act by failing to hire these individuals.

The Sixth Circuit's Decision

While the Sixth Circuit correctly stated the appropriate standard for burdens of proof in a failure-to-hire case citing its own *Fluor Daniel II* decision, it clearly failed to require the NLRB to adhere to that standard and present sufficient evidence to satisfy the NLRB's burden of proof in this case. The Court began by noting that its analysis in *Fluor Daniel II* "clearly articulated the proper burdens of proof in refusal-to-hire cases." App. at 9a. The Court had based that analysis on the NLRB's decision in *Wright Line*, 251 N.L.R.B. 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 102 S. Ct. 1612, 71 L.Ed.2d 848 (1982), which in turn was approved by this Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-03, 103 S. Ct. 2469, 76 L.Ed.2d 667 (1983). *Fluor Daniel II* had recognized that there are two elements to a Section 8(a)(3) violation: "(1)

anti-union animus, and (2) the occurrence of a covered action — for example, a particular discharge or a particular failure to hire." *Fluor Daniel,* 332 F.3d at 968. App. at 10a. The Court went on to say that this analysis requires the General Counsel to "match up applicants with available jobs for which they are qualified . . .". *Id.* (emphasis added). Only then, after the General Counsel had satisfied this burden, does the burden of proof shift to the employer to show why it did not hire the individuals in question.

The Sixth Circuit then noted that after it had issued its *Fluor Daniel II* decision, the NLRB issued its decision in *FES (A Division of Thermo Power)*, 331 N.L.R.B. 9 (2000). App. at 10a. In that decision the Board had attempted to respond to the *Fluor Daniel II* decision and had set forth its own opinions regarding the appropriate burdens of proof in failure-to-hire cases. In *FES*, the Board determined that the General Counsel bears the burden of showing "(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants." *FES,* 331 N.L.R.B. at 12.

While candidly admitting that "the standard in *FES* could be interpreted as requiring a slightly lesser showing than that we articulated in *Fluor Daniel II*," the Sixth Circuit nonetheless held it was a sufficient showing. *Fluor Daniel*, 332 F.3d at 968. App. at 11a. Applying this lesser standard to the instant case, the Sixth Circuit held that the Board had satisfied its burden because, as the ALJ had determined, the company had hired a sufficient number of employees over the

life of the jobs to have hired all of these alleged discriminatees. *Id.* at 969-70. App. at 12a.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT DECISION CONFLICTS WITH SUPREME COURT PRECEDENT

The Sixth Circuit opinion not only conflicts with its prior decision in *Fluor Daniel II*, it conflicts with this Court's decision in *Transportation Management Corp.* There, the Court stated:

> As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus. . . The General Counsel has the burden of proving these elements under §10(c). . . .

Transportation Management Corp., 462 U.S. at 401, 76 L.Ed. 2d at 675.

Clearly this Court has defined the prima facie case of an unfair labor practice to include a showing of both anti-union animus and an "adverse action." In a failure-to-hire case, that adverse action must involve an actual failure-to-hire. There must be a job available into which an applicant must be hired. That applicant must be qualified and available to work. Moreover, he or she must actually desire and intend to work. Finally, the General Counsel must identify the specifically available job so that an initial determination can be made as to whether a hiring decision actually occurred and, if so, a proper comparison can be made to determine respective qualifications. By allowing the General Counsel to avoid the necessity of identifying specific hiring decisions and matching potential applicants to available jobs, the Sixth Circuit has eased the burden on the General Counsel to

showing nothing more than anti-union animus. This easing of the burden fails to satisfy this Court's requirement for a prima facie case.

II. THE SIXTH CIRCUIT DECISION EXEMPLIFIES THE CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS

The Supreme Court should now review the decision at issue so that it can definitively state the respective burdens of proof in a failure-to-hire case. There are at least two different standards coming out of the Sixth Circuit in the two Fluor Daniel cases. *Fluor Daniel II* correctly requires that the General Counsel match job applicants to available jobs for which the employer is actually hiring. The instant *Fluor Daniel* case allows the General Counsel to bypass this burden and show only that the employer hired many employees during the life of particular projects—without reference to any particular hiring decision.

There is another standard announced by the NLRB in *FES* — one that specifically rejects the standard announced by the Sixth Circuit in *Fluor Daniel II* and one that is not followed in the instant *Fluor Daniel* case. As discussed above, the *FES* standard also fails to satisfy this Court's requirements in that it fails to require the General Counsel to match applicants to specific hiring decisions.

The state of the law is further confused by entirely different standards used in other circuits. For example, in *Ultrasystems Western Constructors v. NLRB*, 18 F.3d 251 (4th Cir. 1994), the Fourth Circuit determined that while the Board could establish liability without regard to job availability, it must consider the issue of job availability in the compliance stage before it could order back pay and instatement. Of course, in compliance, the burden of proof would be on the employer to prove lack of job availability instead of on the General Counsel to prove job availability.

In *Starcon, Inc. v. NLRB*, 176 F.3d 948 (7th Cir. 1999), the Seventh Circuit announced yet another standard. *Starcon* held that while the employer should be given the opportunity to show that it would not have hired individuals (presumably because there was no job in which to put them), the General Counsel need only show the number of alleged discriminatees who would have been hired (as few as one). Contrary to *Fluor Daniel II,* the Seventh Circuit held that the General Counsel did not have to match particular individuals to particular jobs.

Therefore, we are faced with at least five different standards. It is imperative that the Court now give proper guidance so that companies in Petitioner's position are not subjected to improper requirements and determined to be liable when the General Counsel has failed to establish a violation of the Act.

III. *FLUOR DANIEL II* ACCURATELY REFLECTS THE STANDARD REQUIRED BY SUPREME COURT PRECEDENT

In its 1998 *Fluor Daniel II* decision, the Sixth Circuit clearly and unequivocally set forth the required burdens of proof in a failure-to-hire case. Following the course laid down by the Supreme Court in *Transportation Management Corp.,* the Sixth Circuit stated the following:

> [T]here are two elements to a Section 8(a)(3) violation: anti-union animus, and the occurrence of a covered action—for example, a particular discharge, or a particular failure to hire. See *Transportation Management*, 462 U.S. at 395, 103 S.Ct. 2469. Under *Wright Line*, the General Counsel bears the burden of proving both of these elements, and the "burden . . . does not shift." *Ibid.*

Fluor Daniel II, 161 F.3d at 966 (emphasis added).

Both *Transportation Management Corp.* and *Fluor Daniel II* mean nothing more or less than the General Counsel must "prove" a "particular failure to hire." The Sixth Circuit could

not have been plainer when it stated, "[I]n a case like this the General Counsel must match applicants with available jobs as part of establishing the second element of his case." *Fluor Daniel II*, 161 F.3d at 968 (emphasis added).

There is no room in *Fluor Daniel II* or in *Transportation Management* for the generalized speculation that took place in the instant case. There is not a single instance in the present case where the Administrative Law Judge or the Board determined that an alleged discriminatee should have been hired in place of a specific person for a specific job. There is not a single time when the qualifications of any alleged discriminatee are compared to specific persons who were hired.

Instead of the specific, "particular" analysis required by *Fluor Daniel II* and *Transportation Management*, the Board deliberately chooses another, lesser way — one initially rejected by the Sixth Circuit and contrary to the directive of the Supreme Court. In its *FES* decision, the Board rejected *Fluor Daniel II's* instruction, finding it unpersuasive. *FES*, 331 N.L.R.B. at 15. Though the instant case decision acknowledges that "*FES* could be interpreted as requiring a slightly lesser showing," *Fluor Daniel*, 332 F.3d at 968, a more candid and correct observation would be that *FES* totally eviscerates the requirements of *Fluor Daniel II* and *Transportation Management*. There is no matching requirement in *FES*. There is no attempt in *FES* to satisfy the legitimate concern that the NLRB is trying to establish an unfair labor practice merely by showing anti-union animus. *Fluor Daniel II* warned against this faulty analysis when it stated the following:

> In short, the mere fact that an employer is shown to harbor anti-union animus, and that certain individuals were not hired by that employer, is insufficient to show a violation of Section 8(a)(1) and (3) of the Act.

Fluor Daniel II, 161 F.3d at 967.

Even a casual reading of the Board's decision in the present case reveals that this rejected showing is all that was done in the instant case.

FES represents not only a lesser — significantly lesser — standard, it embodies an incorrect one. In *Fluor Daniel II* the Sixth Circuit recognized that the *sine qua non* of a refusal-to-hire case is an actual hiring decision in the first place. While the logic of this position is compelling, the Board and the Sixth Circuit itself now ignore the statutory requirements. The Board does so in the name of expedience — it is simply easier to find liability if the Board has a lesser case to prove. The Sixth Circuit has apparently abandoned the correct standard in the name of deference to the Board. Neither reason is sufficient grounds to apply an incorrect standard.

The Circuit Court operates on the mistaken impression that even if *FES* is a lesser standard, the Board has adequately met its *Fluor Daniel II* standard. In fact, the Board's analysis does not even begin to satisfy the *Fluor Daniel II* standard. The Board does not identify "particular hiring decisions" or match one applicant to a job opening. Not a single applicant is compared to and matched against someone or anyone who was hired. The defendant does not have any idea what job, or on what date, the applicants were denied employment. This critical and required information is not mentioned in the opinions of the ALJ, or Board, or even now in the Circuit Court.

It is important to note that the Sixth Circuit's *Fluor Daniel II* analysis comports very well with this Court's analysis of discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e), *et seq.* The burden shifting analysis articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and its progeny, applies equally well to these failure-to-hire cases under the NLRA. The requirement that a plaintiff (in a Title VII case) or the General Counsel (in an NLRA case)

establish an actual violation of the Act as part of his prima facie case is not an onerous burden. *Fluor Daniel II* appropriately places that burden on the General Counsel.

IV. THE NLRB'S GENERAL COUNSEL CANNOT SATISFY HIS BURDEN OF PROOF WHEN HE MAKES NO ATTEMPT TO MATCH APPLICANTS WITH SPECIFIC JOB OPENINGS

Neither the Administrative Law Judge nor the Board made any attempt to match applicants to job openings as required by *Fluor Daniel II*. There is not a single instance of comparing "Applicant X" to the requirements of an electrician position, much less of comparing him to the person actually hired into that position. What did the Administrative Law Judge and the Board do? Nothing more than observe that because Fluor Daniel hired enough people during the life of the jobs (962 over two years at Palo Verde and 2800 over the year at Exxon), it should have hired these individuals. This sham analysis not only fails to satisfy *Fluor Daniel II*, it is meaningless on its face.

In total disregard for the facts, the Board argues that the Administrative Law Judge did something different (matching) in the present case than he did in the underlying case the Sixth Circuit reviewed in *Fluor Daniel II*. *See Fluor Daniel*, 332 F.3d at 968-69. App. at 12a. He, [the same ALJ], did nothing different — and there was no reason for him to have done so. He issued his decision in the present case in February 1998 and the Sixth Circuit reversed his prior decision when it issued *Fluor Daniel II* in November 1998. The Board's representation to the Sixth Circuit that the ALJ matched jobs is the type of total disregard for the record that has led the Court to find that "in the proceeding before us, the Administrative Law Judge expressly considered job availability and made factual findings that vacancies existed that the discriminatees were qualified to fill, and, further, that over

the life of both projects there were enough positions to have employed every discriminatee." *Id.* Clearly, the ALJ did not try to predict with his findings in the present case, the standards the Sixth Circuit would set nine months later in its *Fluor Daniel II* opinion. Moreover, his findings do not satisfy those standards.

First, the job life observations are irrelevant. The ALJ, and subsequently the Board, want to rely on the questionable observation that because Fluor Daniel hired a large number of individuals over the life of these two jobs, the company should have hired all of these alleged discriminatees. Obviously, the total number of jobs contains positions that were of no interest to specific individuals or even the alleged discriminatees as a group. The electrician does not care how many painters or carpenters were hired. The boilermaker does not care how many electricians were hired. Therefore, this job life number which is so central to the Board's position, is actually nothing more than smoke designed to obscure the real issues.

Second, the Sixth Circuit's recounting of the Board's findings illustrates the fundamental flaws in the Board's analysis. For example, at Exxon, while the Administrative Law Judge found applicants were qualified and that in August and September 1994, Fluor Daniel had specific need for electricians, pipefitters and welders, there is no finding that connects these two points — the critical finding would be that the applicants had valid, active applications on file at the time of the need for these positions, and still desired employment when the openings occurred. This critical finding is missing because it is not true. Individuals who had applied in February or March no longer had active applications in August and September. The detailed and critical analysis required by *Fluor Daniel II* is simply not present.

Likewise, the analysis regarding Palo Verde is flawed. The Court notes, as did the Board, that no voluntary union

organizers who submitted applications on June 6 and 23, 1994 were hired, nor were those who attempted to apply on June 27 — yet reports from 1995 show staffing needs. Again, where is the nexus between these points and where is the relevance? If the Administrative Law Judge and the Board had determined that specific hirings were made while the applications were active, that would be a point worth addressing. Staffing reports showing a need for certain crafts long after the individual applications had expired proves nothing. Moreover, the facts are that the few who did reapply at a time when there was a need were hired.[3]

There is another flaw in the analysis regarding Palo Verde. Implicit in the Board's, and ultimately the Court's opinion, is the assumption that because these persons had worked at Palo Verde under the prior employer, there must be the same jobs available under Fluor Daniel. This assumption is false. The plan all along was for Fluor Daniel to significantly reduce the size and scope of the base crew to reduce costs. The base crew went from mostly craftsmen to mostly carpenters and laborers. The facts simply do not lead to the conclusion that there were specific jobs available for these individuals when they had valid, active applications on file.

Finally, the real danger in the Board's analysis is seen in its assumptions regarding individual qualifications. Painting with the broad brush of assumed qualifications, the ALJ and Board ignore the fact that five individuals at Palo Verde (Shoemaker, Garcia, Stroud, Leslie and Rahn) are not mentioned in over 9,000 pages of testimony. An additional three (Case, Sanchez, and Cabrera) are mentioned only to the extent of having been present at a union meeting. There is no testimony or other evidence regarding the qualifications of

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[3] Mark Smith and Steve Horlacher, both Boilermaker union organizers, filled out second applications and were hired. In July 1995, Boilermaker Danny Garnica was hired for an upcoming outage.

any of these men. Yet everyone — the Administrative Law Judge, the Board, and even the Court — assumes they were qualified, should have been hired instead of those who were hired, and are now deserving of back pay.

Importantly, this very issue was addressed to the Administrative Law Judge when Fluor Daniel moved to dismiss those persons about whom no evidence was presented. In denying Fluor Daniel's motion, the Administrative Law Judge stated that such matters could be left to compliance. *Fluor Daniel II* specifically rejected this notion when it held that the obligation to match jobs was not appropriate for compliance:

> [W]e think it preferable to take up matters in their proper logical order by more carefully defining the NLRB's prima facie burden and leaving the NLRB with a broad panoply of remedies once a prima facie case is made out and a violation of the Act has been found on the facts.

Fluor Daniel II, 161 F.3d at 970.

The consequences of the Board's faulty assumptions described above are made glaring by the flawed analysis employed by the Board. Because the Board is able to avoid matching jobs to applicants as required by *Fluor Daniel II*, the Board is able to impose liability without proving a statutory violation. The Board ignores the missing connections in its argument leading to liability and claims these connections can wait until compliance – when, of course, the burden will be on the employer to disprove and not the Board to prove liability.

V. THE BOARD'S FAILURE TO MATCH APPLICANTS WITH SPECIFIC JOB OPENINGS DEPRIVES FLUOR DANIEL OF DUE PROCESS OF LAW

The *Fluor Daniel II* Court established clear requirements for the Board to follow in meeting its burden of proof: qualified applicant, an actual job, and anti-union animus. These requirements, in turn, derive from the statutory language Section 8(a)(3) of the NLRA that a violation must involve "discrimination in regard to hire . . ." Therefore, because the statute also places the burden of proof on the General Counsel of the NLRB (Section 10(c)), the General Counsel must prove an actual hiring decision occurred before he can establish a violation of the Act. The NLRB would skirt this requirement and impose liability without reference to a specific hiring decision. In other words, it would impose liability without the necessary finding of a statutory violation. The employer — having been found liable — now bears the burden of proof to show why it should not have to provide back pay to this person. When, as here, the employer is not given the opportunity to defend its hiring decision — because no specific decision is identified — yet it is found liable to persons who may not have been hired because of a lack of available jobs or acceptable qualifications, then that employer is denied due process. At a minimum such due process rights include not only the right to defend oneself, but also the right to avoid liability unless and until the General Counsel has satisfactorily established the required elements of a statutory violation.

Importantly, the *Fluor Daniel II* Court specifically rejected the Board's attempt to bypass statutory requirements and impose liability on a lesser showing:

> We therefore reject the NLRB's argument that it should be able to establish a prima facie case of an unfair labor practice in a refusal-to-hire case simply by proving the

> existence of anti-union animus and by showing that there were some job vacancies applied for by some voluntary union organizers and that Fluor Daniel harbored animus against these applicants because they engaged in activities protected by the Act.

Fluor Daniel II, 161 F.3d at 967 (emphasis in original).

In the present case, the NLRB has shown nothing more than that described by the above-quoted language. The Sixth Circuit rejected the Board's position in *Fluor Daniel II*, and due process demands that this Court do so now.

CONCLUSION

The petition for writ of certiorari should be granted for the foregoing reasons.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

[Filed June 9, 2003]

Nos, 01-1337/01-4448

FLUOR DANIEL, INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO; PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 198 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 995,

Intervenors.

Argued Feb. 5, 2003

Before: BOGGS, DAUGHTREY, and COLE, *Circuit Judges*.

OPINION

COLE, *Circuit Judge*.

Petitioner-Cross-Respondent Fluor Daniel, Inc. ("Fluor Daniel" or the "Company") appeals the decision of Respondent-Cross-Petitioner National Labor Relations Board

("NLRB" or the "Board") finding that Fluor Daniel violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(1) and (3) (1998), by failing to hire 124 applicants because of their union affiliations. The NLRB filed a cross-petition for enforcement of the unfair labor practice order issued by the NLRB after review of the case. Three unions, including two of the original charging parties, filed briefs as intervenors. Specifically, Fluor Daniel argues that: (1) the NLRB failed to require the General Counsel to allege and prove at the liability stage that jobs existed at the time the discriminatees had active applications on file; (2) the NLRB failed to take into account Fluor Daniel's hiring rules and policies regarding applicants when making its findings with respect to liability; and (3) the NLRB's order is not supported by substantial evidence.

For the reasons stated below, we find that the NLRB's decision that Fluor Daniel violated §§ 8(a)(1) and (3) of the Act[1] was supported by substantial evidence and we GRANT the NLRB's cross-petition for enforcement for all employees except the five rebar helpers. We DENY the Board's cross-

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[1] The Act reads in relevant part:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization . . . .

It is well settled that the protections against discrimination in § 8(a)(3) extend to applicants for employment. *See, e.g., NLRB v. Town & Country*, 516 U.S. 85, 86-97, 116 S.Ct. 450, 133 L.Ed.2d 371 (1995); *NLRB v. Flour Daniel, Inc.*, 161 F.3d 953, 961 (6th Cir.1998).

petition in regard to the rebar helpers and REMAND to the Board for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Background

Fluor Daniel is the nonunion subsidiary of the Fluor Corporation, a holding company that also has a unionized subsidiary, Fluor Constructors. Fluor Daniel has a unionized subsidiary called TRS. Fluor Daniel, Fluor Corporation, and TRS are separate corporations with separate boards, officers, labor relations, and personnel policies.

In 1993, Fluor Daniel was hired for two distinct contracting projects—one to rebuild a coker plant destroyed by fire at the Exxon refinery in Baton Rouge, Louisiana ("Exxon"), and another to take over maintenance of the nuclear power plant at the Palo Verde Nuclear Generating Station near Phoenix, Arizona ("Palo Verde"). Fluor Daniel intended both projects to be "open shop," i.e., employees at the sites would not be part of labor organizations and there would be no union labor contract between Fluor Daniel and the hired employees.

Fluor Daniel has developed a hiring priority that it applies to all of its projects. The Company gives first preference to previous Fluor Daniel employees who have been certified through the Company's craft certification program. In order to be certified, Fluor Daniel employees are given a written test, or a demonstration test for welders, and an evaluation of their job performance after a certain period of time on the job, usually thirty days. Employee certification also requires a total of forty-two months of craft experience. Employees attaining certain scores on both their written or demonstration test, and job evaluation, are eligible for in-house certification in their craft. An employee may be certified in more than one craft.

When a project begins, Fluor Daniel first looks to its company database of employees with certification, and sends those former employees solicitations by mail, called mailgrams, describing the job and inviting them to the jobsite for processing, interviewing, and possible hiring. After attempting to fill open positions with certified applicants, Fluor Daniel prefers to hire applicants with previous Company experience. Lastly, Fluor Daniel looks at all other applicants, including those from the general public responding to newspaper advertisements and job postings at project sites. According to Company policy, all applications submitted at jobsites are entered into the Craft Employment Application Disposition Log and held active for sixty days from the time of submission. Additional Company policies adopted at jobsites include policies that applications were only accepted when positions were available and that applicants could only apply for one position.

1. Palo Verde

Fluor Daniel was hired by the Arizona Public Service Company ("APS") to provide service and maintenance at Palo Verde, the largest nuclear power facility in the United States, for a total of three years beginning in the summer of 1994. Fluor Daniel was responsible for the maintenance of the plant generally, and for maintenance and refueling during scheduled outages when the plant was shut down. Before Fluor Daniel won the bid, the plant had been constructed, serviced and maintained by Bechtel Corporation ("Bechtel"), one of the world's largest general contractors and a unionized employer. In performing its contract at Palo Verde, Bechtel previously had contracted with craftsmen from several local unions, including the Boilermakers Local 627, Millwright Local 1914, and Ironworkers Local 75.

In its bid proposal for the Palo Verde project, Fluor Daniel stated that it had "determined that an open shop labor posture can best meet our goals." The proposal also emphasized that

Fluor Daniel had a database of its former employees that included many with nuclear experience, and that the Company had the expertise to transition Palo Verde from a closed shop facility, i.e., one where all employees are union members, to an open shop facility.

Staffing at Palo Verde began in June 1994, and by February 1996 Fluor Daniel had hired 962 craft employees. Periodically, APS would prepare requisitions called Contract Labor Requests ("Requests") for Fluor Daniel, which indicated the number and type of craft employees that were needed at any particular time. Based on the Requests, Fluor Daniel was authorized to hire a certain number of employees for its base crew and for meeting its staffing needs during outages. Fluor Daniel relied heavily on telephone and mailgram recruiting of former employees, including many who lived outside of Arizona. The Company also posted available positions at the jobsite and allowed the general public to submit applications on a walk-in basis. Out of the 200 former Bechtel employees who previously had worked at the site, received training from the APS, and obtained security clearance, ninety-one were hired by Fluor Daniel.

Area trade unions decided to organize and apply for jobs at the site as voluntary union organizers ("VUOs"). Gary Evenson, a paid organizer from a local union of boilermakers, organized the effort at Palo Verde with former Bechtel employees. The VUOs "agreed to accept employment if offered, to stay until laid off, to do a good job . . . to discuss the benefits of union representation with other employees [on the site] and to record notes of actions that appeared to interfere with protected rights." They were instructed to wear conspicuous union insignia and write "voluntary union organizer" on their applications. Fifty-two former Bechtel employees agreed to serve as VUOs and submitted applications at the jobsite between June 16 and June 23, 1994. None of these fifty-two former Bechtel employees were

hired, though monthly reports in 1995 indicated Fluor Daniel had trouble meeting staffing needs for the project. On June 27, 1994, twenty-six former Bechtel employees serving as VUOs attempted to submit applications and were refused.

2. Exxon

After winning the Exxon bid, Fluor Daniel recruiters solicited applications from former Fluor Daniel employees through the Company database by mailgram, called other jobsites that were closing, and maintained a telephone log of persons calling the Company for work at the site. Recruitment at the site was coordinated by Senior Site Manager Bill Austin and recruiter Rhonda Glover. Fluor Daniel also began three weeks of open staffing, posting job notices on-site and advertising in local papers. By January 19, 1994, Company recruiters had received 700 applications. Fluor Daniel followed its general hiring policies and procedures except that it made a significant change to the length of time for which applications were held active. The Company claimed that the urgent nature of the Exxon project necessitated a deviation from its normal sixty-day active application rule, and the implementation of a thirty-day active application rule. This deviation from Company policy was recommend by Ed Martinez, Industrial Relations Specialist, and approved by Jim Sayre, Regional Human Resources Manager at Fluor Daniel in Sugarland, Texas.

Area union organizers decided to organize an effort similar to that organized at Palo Verde. The Boilermakers union's business agent, Kendrick Russell, and an organizer of the Pipefitters' union, Jeff Armstrong, coordinated the effort. To that end, groups of VUOs submitted applications at the Exxon site on six occasions between January 19, 1994 and May 10, 1994. As in Palo Verde, applicants wore union insignia and indicated their union affiliation on their applications. None of these applicants were hired immediately, though one who had applied in January was hired after Glover was informed by

Martinez that hiring union-affiliated applicants would improve the chances that Fluor Daniel could avoid a complaint from the NLRB. In total, Fluor Daniel hired nearly 2,800 employees by the end of the Exxon project in December 1994.

B. Procedural Background

The Boilermakers International Union ("Boilermakers") filed charges with the NLRB against Fluor Daniel in the Phoenix, Arizona regional office alleging various violations of the Act. The Boilermakers and the Pipefitters Local ("Pipefitters") filed charges of various unfair labor practices against Fluor Daniel in the NLRB's regional office in Baton Rouge, Louisiana. The Regional Directors of the Board issued amended complaints in Phoenix and Baton Rouge on April 17, 1995 and March 29, 1995, respectively, alleging that Fluor Daniel violated §§ 8(a)(1) and (3) of the Act. On April 12, 1995, the General Counsel of the Board ordered consolidation of the charges. Administrative Law Judge Martin J. Linsky ("ALJ") held fifty-one days of hearings in Phoenix and Baton Rouge between August 1, 1995, and December 12, 1996. On February 6, 1998, the ALJ issued his decision, finding, most significantly, that Fluor Daniel had violated the Act by unlawfully discriminating against forty job applicants at Exxon and seventy-nine applicants at Palo Verde because of their union affiliation. Fluor Daniel was ordered to cease and desist from its illegal activity, hire the 119 applicants who had been refused employment or refused the opportunity to apply, to pay backpay and benefits to the applicants, and to post a notice at jobsites around Palo Verde and Exxon notifying the public of its violation of the Act.

All parties, including the charging parties, filed exceptions to the decision of the ALJ before the Board. The NLRB issued a Decision and Order on March 2, 2001, affirming the rulings, findings of fact, and conclusions of law of the ALJ. However, the NLRB modified the Order of the ALJ. In

addition to several small modifications, the NLRB's decision made three significant modifications. First, the NLRB required Fluor Daniel to post the notice at all of its jobsites in the nation, not just in the areas surrounding the Exxon and Palo Verde sites, and to mail the notice to all employees. Second, the NLRB acknowledged that the ALJ inadvertently omitted a testing remedy and included a provision in its order that the discriminatees should be tested in order to receive Fluor Daniel certification. Third, the NLRB found that Fluor Daniel unlawfully refused to consider five additional applicants for rebar helper positions at Exxon (these positions involved assisting with laying the cement foundation of the coker) and ordered remedies for those individuals consistent with the remedies set forth for the other violations. On March 12, 2001, Fluor Daniel filed a petition for review of the NLRB's decision to this Court. The Board filed its application for enforcement on March 29, 2001.

II. DISCUSSION

A. Standard of Review

The scope of our review of determinations by the Board is limited. We review factual findings of the NLRB to determine if they are "supported by substantial evidence on the record considered as a whole." *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995); *see also* 29 U.S.C. § 160(e) (1998) ("The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003) (quoting *DuPont Dow Elastomers, L.L.C. v. NLRB*, 296 F.3d 495, 500 (6th Cir. 2002)). We also review the Board's application of the law to the facts under the substantial evidence standard. *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 776 (6th Cir. 2002). We may not displace the Board's reasonable inferences even if we would

have reached a different conclusion. *Id.* Additionally, we severely limit our review of credibility determinations and accept those made by the Board unless they have "no rational basis." *NLRB v. Valley Plaza, Inc.*, 715 F.2d 237, 242 (6th Cir. 1983).

B. Proof that Openings Existed

Fluor Daniel argues that the NLRB failed to require the General Counsel to prove that openings existed for each discriminatee at the time they had applications pending, as required by this Court's decision in *NLRB v. Fluor Daniel*, 161 F.3d 953 (1998) ("*Fluor Daniel II*"). We decline to dismiss the charges against Fluor Daniel based on this argument. If the NLRB applies the correct standard of law, "[t]he Board's application of law to facts is also reviewed under the substantial evidence standard." *NLRB v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 952 (6th Cir. 2000). There is substantial evidence in the record as a whole to uphold the finding of the NLRB that openings existed during the time that discriminatees submitted, or attempted to submit, applications.

The General Counsel bears the burden of proof in unfair labor practices cases. 29 U.S.C. § 160(c) (1998) (stating that violations of the Act can be adjudicated only "upon the preponderance of the testimony taken" by the NLRB); *see also* Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (1996) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). This Court in *Fluor Daniel II* clearly articulated the proper burdens of proof in refusal-to-hire cases. The Court relied on the NLRB's decision in *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899, 904 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), that was approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-03 (1983). In *Fluor Daniel II*, we adopted the standard set forth by the Supreme Court in

Transportation Management, and held that "there are two elements to a Section 8(a)(3) violation: [(1)] anti-union animus and [(2)] the occurrence of a covered action - for example, a particular discharge, or a particular failure to hire." 161 F.3d at 966. We specifically rejected the NLRB's position that a simple showing of anti-union animus and the fact that certain individuals were not hired were sufficient to show a violation of §§ 8(a)(1) and (3), holding instead that an actual "failure to hire" had to be shown. *Id.* at 967. We specifically held that in order to make out a prima facie case for a refusal-to-hire violation, the General Counsel must first establish the two elements articulated in *Transportation Management*. *Id.* After the General Counsel has proven both elements, the employer must present evidence that the employees in question would not have been hired, even if they had not been involved with a union. *Id.* at 966. This analysis requires the General Counsel to "match[] up applicants with available jobs for which they are qualified . . . ." *Id.* at 968. This means that employees involved in a violation of § 8(a)(3) must be actually qualified for the respective job positions and that the job positions must be actually available. Once the General Counsel makes a showing that the employer did not hire the qualified applicant for an available position, the General Counsel must also then show that the decision was motivated by anti-union animus. *Id.* at 966.

In light of our decision in *Fluor Daniel II*, the NLRB decided *FES (a Division of Thermo Power) & Plumbers & Pipefitters Local 520 of the United Association*, 331 N.L.R.B. No. 20, 2000 WL 627640 (May 11, 2000), to "give guidance to all parties litigating refusal-to-hire and refusal-to-consider violations by making clear the elements of the violation, the respective burdens of the parties, and the stage at which issues are to be litigated." *FES*, 2000 WL 627640, at *4. In

FES, the NLRB held that in a refusal-to-hire case, the General Counsel bears the burden of showing:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show . . . that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity.

FES, 2000 WL 627640, at *6 (footnotes omitted)

Though the standard in *FES* could be interpreted as requiring a slightly lesser showing than that we articulated in *Fluor Daniel II*, the NLRB in *FES* fully addressed our concerns and set out a framework wholly consistent with our holding in *Fluor Daniel II*. The two decisions require that the General Counsel make specific findings both that jobs were available at the time of the alleged discrimination and that discriminatees were qualified for the jobs. *Compare Fluor Daniel II*, 161 F.3d at 968 *with FES*, 2000 WL 627640, at *6.

In the present case, the NLRB specifically acknowledged and applied the standards of *FES* in its analysis. *Fluor Daniel*,

2001 NLRB LEXIS 131, at *56 (Mar. 2, 2001). The NLRB articulated in its opinion the standards set out in *FES* and *Fluor Daniel II* and adopted the findings of the ALJ that the General Counsel had "clearly established his prima facie case." *Id.* With respect to the specific issue of job matching, the NLRB adopted the findings of the ALJ that Fluor Daniel was hiring during the time that the discriminatees applied and that the discriminatees were qualified. *Id.* In fact, the NLRB noted, all the discriminatees at the Palo Verde site were actually former employees of Bechtel and obviously qualified to perform the work. The NLRB rejected Fluor Daniel's challenge, raised in its exceptions, that the ALJ failed to match properly each discriminatee with an available job that they were qualified to perform, as required by this Court in *Fluor Daniel II*. The NLRB found that

> [i]n contrast to *Fluor Daniel II*, in the proceeding before us, the administrative law judge expressly considered job availability and made factual findings that vacancies existed that the discriminatees were qualified to fill, and, further, that over the life of both projects there were enough positions to have employed every discriminatee.

Fluor Daniel, 2001 NLRB LEXIS, at *69. The NLRB found that the analysis undertaken by the ALJ comported both with our decision in *Fluor Daniel II* and the NLRB's decision in *FES*.

We agree. The ALJ undertook a detailed analysis of the discrimination at each of the work sites, noting names of applicants, the dates that they applied for positions or attempted to apply for positions, the number of applicants actually hired by Fluor Daniel, and the positions that were filled by Fluor Daniel. *Fluor Daniel, Inc.*, 1998 NLRB LEXIS 1009 (Feb. 6, 1998). With regard to the Exxon site, the ALJ found that the "record is clear that the union affiliated applicants for employment applied for work/and were qualified. . . ." *Id.* at *39. The ALJ found that on five

different days, union activists applied for employment and were not hired, and that on one day, four union pipefitters were not allowed to apply or to be tested. *Id.* at *50-*51. The ALJ continued his analysis and found that Fluor Daniel hired other applicants for the same positions and that Fluor Daniel had such desperate needs for electricians, pipefitters, and welders in August and September 1994 that it took fairly drastic action. *Id.* First, in August and September 1994, Fluor Daniel subcontracted with several nonunion firms in order to fill its staffing needs, and second, it sent out a total of 20,218 mailgrams to former employees in September and October 1994 looking for pipefitters and welders. *Id.* at *51-*52. Furthermore, regarding the discriminatees' qualifications for the job, the ALJ found that the applicants at Exxon were "highly qualified based on the material contained in their applications in the record." *Id.* at *35; *see also Glenn's Trucking Co. v. NLRB*, 298 F.3d 502 (2002) (finding that after examining the applications of individuals hired by the company, it was established that the discriminatees' credentials were in the same range).

At Palo Verde, the ALJ found that groups of discriminatees went to the jobsite and filled out applications on four different days in June 1994 and that one group of discriminatees attempted to submit applications but were refused on another day in June. *See Fluor Daniel, Inc.*, 1998 NLRB LEXIS, at *15-*20. The ALJ "next inquir[ed] . . . whether there were jobs that were to be filled." *Id.* at *24. The ALJ found that from June 1994 until February 1996, Fluor Daniel hired 962 craftsmen, that the applications submitted by the discriminatees were active, and that all the applicants had the required experience because they worked at Palo Verde previously for Bechtel. *Id.* at *25.

This is precisely the type of detailed analysis required under our decision in *Fluor Daniel II*, as incorporated by the NLRB in *FES*. Because the findings and conclusion of the

NLRB are supported by substantial evidence on the record, we decline to disturb the NLRB's application of the law to these facts.

C. Fluor Daniel's Hiring Rules and Policies

Fluor Daniel argues that the NLRB failed to take into account the hiring rules and procedures developed by the Company in its finding of liability. Specifically, Fluor Daniel argues that two rules should have been taken into account by the NLRB: (1) the rule stating that applications are active for sixty days; and (2) the hiring preference system.

Fluor Daniel's argument misunderstands the findings of the NLRB regarding its hiring rules and policies. The Company is correct that neither the ALJ nor the NLRB challenged the lawfulness of its hiring rules and policies per se. The ALJ concluded that, "I do not find on the basis of the record before me that [Fluor Daniel's] hiring practice *per se* is violative of the Act." *Fluor Daniel*, 1998 NLRB LEXIS, at *8. The NLRB declined review of Fluor Daniel's hiring practices, stating that "[b]ecause we find that [Fluor Daniel] applied its hiring policies and preferences in an unlawful manner, we find it unnecessary to reach Charging Party Boilermakers' argument that [Fluor Daniel's] hiring policies were inherently destructive of protected rights, and invalid per se." *Fluor Daniel*, 2001 NLRB LEXIS, at *10 n.9. Instead, the NLRB found that Fluor Daniel had violated the Act because it "unlawfully applied its system of hiring preferences, policies, and procedures so as to refuse to consider or hire 120 voluntary union organizers . . . ." *Id.* at *10.

1. The thirty-day active application rule at Exxon

The finding by the NLRB that the thirty-day rule was applied in a discriminatory fashion is supported by substantial evidence, and Fluor Daniel acknowledges that it deviated from its hiring policy in twenty-seven cases. Fluor Daniel

instituted a thirty-day active application rule at Exxon in order to meet the urgent needs of the project. The NLRB did not address the lawfulness of this change in corporate policy, but found simply that the rule, though "enforced more rigorously than other rules," *id.* at *29, was applied in a discriminatory manner against the union applicants. Specifically, the NLRB found that Fluor Daniel failed to advise the discriminatees that the period for which their application would be valid had been changed. *Id.* The NLRB also found that the applications themselves lacked such notification, containing only a small line at the bottom of the page stating that the applications would be active for sixty days. However, the NLRB found that "[w]hen the alleged discriminatees' applications were submitted into evidence at trial, the '60' had been crossed out and '30' had been substituted by hand." *Id.* Furthermore, the NLRB found that the discriminatees testified that the forms they completed were not modified in any such manner, and there was no evidence presented that the applications of the nonactivists had been altered. *Id.* In contrast to the treatment of the activists on the Exxon project, the NLRB found that Fluor Daniel deviated from the thirty-day rule by hiring twenty-seven craft employees more than thirty days after they applied. *Id.*

Fluor Daniel, relying on *Kelly Construction of Indiana, Inc.*, 333 N.L.R.B. No. 148, slip op. at 1 (2001), argues that the deviations for twenty-seven journeymen out of the 2,800 total persons hired is de minimis. This argument is without merit. The NLRB in *Kelly* held that an isolated and marginal deviation from a neutral, uniformly applied hiring policy would not constitute a violation of the Act. *Id. Kelly* does not support Fluor Daniel's conduct here because the thirty-day rule was not uniformly applied and because deviations from the rule can be considered neither isolated nor marginal.

Furthermore, the NLRB's discussion of the thirty-day rule was prompted by Fluor Daniel's assertion that its hiring

policy constituted a defense to the allegations that it had violated the Act. Fluor Daniel sought to use the thirty-day rule as a reason for not hiring the alleged discriminatees. In considering this defense against the evidence presented, the NLRB concluded that the policy as applied to the union activists was pretextual. We conclude that the factual findings of the NLRB on this issue are supported by substantial evidence. *Cf. Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426, 432 (holding that a NLRB determination of the validity of a policy asserted as a nondiscriminatory reason for refusing to hire an applicant, is a question of law that is reviewed *de novo*). The NLRB found evidence from the Company's own files demonstrating both that Fluor Daniel had serious difficulty staffing the Palo Verde project and that the thirty-day rule was abandoned in favor of nonactivist applicants and rigidly applied against the discriminatees.

2. Fluor Daniel's hiring preference system

Fluor Daniel argues that the NLRB failed to take into account the Company's written policies regarding hiring preferences. As explained previously, Fluor Daniel gave first priority to applicants who were certified by the Company, second priority to applicants who had previously worked with Fluor Daniel, and third priority to all other applicants. Fluor Daniel argues that given these priorities, the length of craft experience required and the policy that applications were only active for sixty days, only twelve of the discriminatees at Palo Verde could have been hired absent Fluor Daniel's violation of the Act.

There is substantial evidence in the record to support the NLRB's finding that Fluor Daniels's hiring system was used in a discriminatory manner. We must give deference to the inferences drawn by the Board and must determine whether those inferences are reasonable in light of the facts. *See, e.g., NLRB v. Ky. May Coal Co.*, 89 F.3d 1235, 1242 (6th Cir. 1996). Fluor Daniel is correct in asserting that the NLRB

never challenged the validity of hiring preferences per se. But, as with the thirty-day application rule, the NLRB found that Fluor Daniel applied its preferences in a manner which discriminated against the union activists. In particular, the NLRB found evidence that the scope of the preferences was expanded to include all former Fluor Daniel employees (not solely certified ones), without proper authorization. *Fluor Daniel*, 2001 NLRB LEXIS, at *61-*62.

Regarding the Exxon site, the NLRB found that since "[n]early one-fifth of Exxon journeyman hires were non-preferenced," *id.* at *25, the use of the preference system could not explain why the discriminatees were not hired. The NLRB also found that Fluor Daniel hired forty-three former employees in lieu of discriminatees, even though those former employees lacked the required forty-two months of craft experience, were certified in crafts other than those for which they were hired, whose applications had expired, or were considered for crafts other than those for which they had applied. *Id.* at *31-*34. Furthermore, the NLRB found that Fluor Daniel's proffered defense that the discriminatees did not have the necessary forty-two months of craft experience was also pretextual. *Id.* The NLRB found that many of the discriminatees had twenty to thirty years of experience; that Fluor Daniel recruiters never informed them that their applications contained insufficient experience; that Fluor Daniel did not give credit for training in union apprenticeship programs, while it did give credit for training at Fluor Daniel's craft school; and that over a hundred other applicants had less than forty-two months of experience. *Id.* In sum, the NLRB concluded that Fluor Daniel used its hiring preferences as a pretext for discriminating against the union activists. A review of the record shows that the inference made by the NLRB on this issue is supported by substantial evidence.

D. The NLRB's Decision and Order is Supported by Substantial Evidence

In its final assignment of error, Fluor Daniel argues that the Decision and Order of the NLRB is not supported by substantial evidence. The Company argues that "the Board ignored a significant part of the evidence and drew unreasonable and illogical inferences and conclusions from the evidence it did consider." Specifically, Fluor Daniel makes four arguments relating to errors in the findings of fact and subsequent conclusions of the Board: (1) the Board erroneously credited testimony by Gary Evenson, a witness for the Charging Party Boilermakers; (2) the Board erroneously substituted its judgment for the business judgment of Fluor Daniel; (3) the Board erroneously concluded that Fluor Daniel considers only nonunion employees to be loyal; and (4) the Board erroneously found that Fluor Daniel had large numbers of deviations from its hiring protocols. All of these arguments are without merit, as substantial evidence supports the findings of the NLRB.

First, Fluor Daniel asks us to reassess the ALJ's credibility determination concerning Evenson, a key witness from Palo Verde, based on the fact that Evenson was found to have filed frivolous unfair labor practice charges, falsified evidence, and committed perjury in a 1993 organizing event in the case of *Irwin Industries, Inc.*, 1996 NLRB LEXIS 666 (Sept. 18, 1996). However, we may not review credibility determinations unless they have no rational basis. *Valley Plaza, Inc.*, 715 F.2d at 242. The ALJ was under no obligation to consider determinations made by another ALJ in a wholly different case regarding the credibility of a particular witness. During the hearing, the ALJ ruled under Rule 103 of the Federal Rules of Evidence that any testimony regarding Evenson's involvement in *Irwin Industries* would add confusion to the current case. Furthermore, in *Irwin Industries*, 325 NLRB 796, 797 n.7 (1998), the ALJ was reversed by the NLRB,

who explicitly stated that "we do not agree with the [ALJ] that the unfair labor practice charges related . . . to the three employees [including Evenson] were frivolous and knowingly false." After hearing the testimony and observing Evenson at the hearing in this case, the ALJ concluded that his testimony was credible. There is no evidence presented to refute that conclusion or that should lead this Court to disturb the ALJ's credibility determination.

Second, Fluor Daniel argues that the Board erroneously substituted its judgment for Fluor Daniel's business judgment by suggesting what protocol should have been used for staffing the two projects. In particular, the Company argues that it was the APS, and not the Company, that determined staffing requirements for Palo Verde and that the Board penalized Fluor Daniel for not making certain business decisions, such as reviewing the Bechtel workforce for qualified employees.

Fluor Daniel's arguments mischaracterize the findings of the NLRB. In its Decision and Order, the NLRB never challenged the lawfulness of Fluor Daniel's systems of hiring preferences, policies, and procedures per se. Instead, the NLRB concluded that Fluor Daniel had applied those preferences, policies and procedures in a discriminatory way, and substantial evidence supports this conclusion. The NLRB noted several instances in which Fluor Daniel made choices that were contrary to the provisions of the Act and we review those factual findings only to determine whether they are supported by substantial evidence. *See W.F. Bolin Co.*, 70 F.3d at 870.

The findings of the NLRB do not represent an attempt by the Board to substitute its judgment for the business judgment of the Company. Instead, the NLRB cited many instances of disparate treatment between the discriminatees and other applicants, noting in each case not that Fluor Daniel should have conducted business differently, but rather how Fluor

Daniel treated discriminatees in a manner different from other applicants. For example, the NLRB found that Fluor Daniel discriminated against applicants in Palo Verde by failing to consider the applications of former employees of Bechtel, an obviously qualified and available pool of potential employees, while actively seeking applications from other sources. The NLRB found other instances where Fluor Daniel acted in contravention of the Act in Palo Verde by treating discriminatees differently: Fluor Daniel allowed several discriminatees to apply for nonexistent job classifications, while allowing other applicants to apply for comparable work with different job classifications; Fluor Daniel invited nonunion applicants to check back in the case of no-shows but did not invite the alleged discriminatees to do the same; and Fluor Daniel never referred any of the discriminatees to its Wolf Creek nuclear project, as it did for nonunion applicants.

Fluor Daniel's third and fourth arguments relate purely to findings of fact and inferences and do not warrant lengthy discussion, as we review them only to determine if they are supported by substantial evidence. *See Id.* Fluor Daniel argues that the NLRB erred when it found that Fluor Daniel considered only nonunion employees to be loyal. The Board found substantial evidence that Fluor Daniel harbored anti-union animus, in particular finding that Fluor Daniel did not consider union organizers to be loyal. *Fluor Daniel*, 2001 NLRB LEXIS, at *59. In support of this conclusion, the Board found that Fluor Daniel promotes its database of "loyal" employees to customers. *Id.* Indeed, in its proposal for Palo Verde, Fluor Daniel stated that it had "determined that an open shop labor posture can best meet [Palo Verde's] goals and provide them with "[w]orkers loyal to [Palo Verde] and Fluor Daniel instead of a local union." Therefore, the conclusions of the NLRB that Fluor Daniel openly expressed the view that union organizers could not be loyal to the Company is supported by substantial evidence.

Finally, Fluor Daniel argues that the NLRB erroneously found that it had a large number of deviations from its hiring protocol. In particular, at Exxon the NLRB found 3,000 deviations from Fluor Daniel's hiring protocols with respect to the hire of nonactivists, but strict adherence to several hiring protocols to exclude the discriminatees from consideration. The NLRB found deviations from the protocol with respect to three major areas—hiring of former employees, hiring of applicants with inactive applications, and hiring of applicants with insufficient experience. *Id.* at *35. As previously discussed, Fluor Daniel hired former employees (also referred to as preferenced employees) who did not have forty-two months of craft experience, who had been certified in crafts other than the ones that they were hired to perform, who had never submitted applications or whose applications had expired, or who were considered for crafts other than those for which they applied. Second, Fluor Daniel also hired twenty-seven journeymen in breach of the Company's thirty-day active application rule that it implemented for the Exxon project. *Id.* at *29. Third, Fluor Daniel hired forty-three former employees without the requisite forty-two months of experience, and 124 applicants without former company experience and with less than forty-two months experience at Exxon. *Id.* at *34.

The NLRB additionally found that at Exxon, contrary to the requirement that applicants submit only one application and seek consideration for only one position, Fluor Daniel considered two-thirds of all applicants for positions other than those indicated on their applications. *Id.* at *35. None of the discriminatees were afforded the same opportunity. The NLRB, after extensively reviewing the enormous amount of Fluor Daniel's employment data, made several other findings, including that: (1) of the applicants hired prior to submitting their applications, two-thirds had inadequate experience and two-fifths were considered for different crafts; (2) of the applicants hired more than thirty days after submitting

applications, three-quarters had inadequate experience and four-fifths were considered for different crafts; and (3) of the noncertified former employees with less than forty-two months experience, two-thirds were considered for other crafts. *Id.*

The NLRB found 892 deviations from Fluor Daniel's hiring protocol at Palo Verde, all in favor of nonunion activists. *Id.* at *52. Analyzing the Company's own data for nonpreferenced hires through November 1, 1994, the NLRB found: nine journeymen were hired before they applied; two journeymen were hired after their applications had expired; eighty-eight journeymen were hired with less than forty-two months of craft experience; and over 700 applicants were considered for crafts other than those for which they applied. *Id.* The NLRB also found that "significant percentages of applications contained more than one deviation." *Id.*

The deviations found by the NLRB represent its factual findings after review of the evidence presented, including numerous documents and hearing testimony. Fluor Daniel argues that "the exhibits [presented] show the silliness of the Board's finding," because many of the deviations in which the craft on the applications differed from the craft hired were the result of spelling errors, the use of abbreviations and a vernacular substitute. Under our standard of review of factual findings made by the NLRB, we find that these factual finding are supported by substantial evidence. *See W.F. Bolin Co.*, 70 F.3d at 870. The conclusions of the NLRB were the result of the examination and statistical analysis of more than 1,000 applications and accompanying Fluor Daniel databases of former employees and hires. Clearly, the findings of fact are supported by substantial evidence on the record considered as a whole, and Fluor Daniel's argument that some of the nearly 900 findings of deviations were the product of spelling errors or misunderstandings is simply unpersuasive. Given that the NLRB examined over 1,000

applications and found almost 900 deviations, even if some portion of these deviations were the result of misunderstandings, the record nevertheless contains substantial evidence to support the finding of the NLRB.

Finally, we hold that the standard set forth in *FES* for "refusal-to-consider" claims, as applied in this case by the NLRB to the five union members who sought positions as rebar helpers, is in conflict with our caselaw. Therefore, we remand this issue to the NLRB for further proceedings consistent with this opinion.

On April 19, 1994, five union members submitted applications for rebar helper positions in response to a job posting at the Exxon site. Both the recruiter and supervisor at the site acknowledged that postings were made only if jobs were available and a requisition had been completed. After the applications were submitted, the job posting was removed and the applications were never considered. The ALJ dismissed the failure-to-hire allegations against Fluor Daniel regarding these employees, apparently finding not only that no rebar helpers were hired after the employees submitted their applications, but that there were no jobs available when the union members applied. However, the NLRB concluded that the ALJ did not fully address the failure- to-consider claim for these applicants.

The NLRB analyzed the failure to consider claim under the standard it set forth in *FES*. In *FES*, the NLRB reiterated its long-held position that "hiring need not take place in order to find an unlawful refusal to consider union applicants for employment." 2000 WL 627640, at *11. The Board explained that in order to find a violation in refusal to consider cases:

> [T]he General Counsel bears the burden of showing . . . (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.

> Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

Id. at *10. In adhering to this test in its analysis of the alleged violations of the Act by FES, the Board stated that it was unpersuaded by our position in *Fluor Daniel II* that there can be no violation of Section 8(a)(3) when no hiring is occurring. *Id.*

In *Fluor Daniel II*, we specifically held that violations of Section 8(a)(3) can only occur when an employer is hiring for the position(s) at issue. We noted that in order to prove a violation of Section 8(a)(3), the General Counsel needs to show (1) that there is anti-union animus, and (2) the occurrence of a covered activity, for example a particular discharge or a particular failure to hire. *Fluor Daniel II*, 161 F.3d at 966. Once the General Counsel proves these elements, the employer must show that the employees in question would not have been hired or considered even in the absence of their union affiliation. *Id.* In dicta we noted that: "An employer who has no need for a particular applicant's services has not failed or refused to consider an applicant in violation of the Act." *Id.* at 967 n.15. We also stated that, "There is no interference with, restraint, or coercion of applicants in the exercise of their protected rights when an employer, even with anti-union animus, rejects applicants who are in fact unqualified or for whose particular services the employer simply has no need." *Id.* at 967.

We do not agree with the Board's use of the test set forth in *FES* and rejected by this court in *Fluor Daniel II*. We therefore remand this issue to the NLRB for a determination of whether in fact, as required for a violation of Section 8(a)(3) of the Act, there were jobs available for rebar helpers when the union members applied.

III. CONCLUSION

For the reasons stated above, we find the NLRB's conclusions supported by substantial evidence and we GRANT the NLRB's cross-petition for enforcement for all employees except the five rebar helpers. We DENY the Board's cross-petition in regard to the rebar helpers and REMAND to the Board for further proceedings consistent with this opinion.

APPENDIX B

Cases 15-CA-12544, 15-CA-12666, 15-CA-12723, 15-CA-12852, 15-CA-12936, 15-CA-12938, 28-CA-12750, and 28-CA-13357

FLUOR DANIEL, INC. and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 995, AFL-CIO and UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES and CANADA, PLUMBERS & STEAMFITTERS, LOCAL UNION NO. 198, AFL-CIO.

March 2, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On February 6, 1998, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel fried exceptions and; a supporting brief and an answering brief to the Respondent's exceptions. The Respondent filed exceptions and a supporting brief, a memorandum in opposition to the Charging Parties' exceptions, and a reply brief to Charging Party Boilermakers' exceptions. Charging Party Boilermakers and Charging Party Pipefitters filed memoranda in opposition to the Respondent's exceptions and cross-exceptions and supporting briefs.[1]

[1] In addition, on June 14, 2000, the Board invited the parties to submit briefs addressing the framework of *FES*, 331 NLRB 9 (2000), including

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and to adopt the

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whether-under that framework—the record is sufficient to decide the issue presented. The General Counsel, the Respondent, and Charging Party Pipefitters filed briefs. Having fully considered those briefs, and the record as a whole, we have concluded that the current record is sufficient.

[2] We find no merit in the Respondent's exception contending that the General Counsel's challenge to the Respondent's hiring preferences is untimely pursuant to Sec. 10(b) of the Act. There is no allegation that the policies are facially unlawful; accordingly, it is not relevant that the policies were implemented more than 6 months prior to the charge. We likewise reject the contention that *Jefferson Chemical*, 200 NLRB 992 (1972), precludes litigation of hiring preference allegations that were not raised in two prior proceedings, summarized infra at fn. 6, that involved the Respondent's hiring practices. *Jefferson Chemical* is inapposite: the prior proceedings concerned different worksites, different discriminatees, and different events. Moreover, the General Counsel is not precluded from litigating claims because of their proximity in time to prior proceedings involving the same respondent. *See Harrison Steel Castings*, 255 NLRB 1426 (1981); *Maremont Corp.*, 249 NLRB 216 (1980).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondent's allegations of bias. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence. Nor does it demonstrate bias that the judge permitted cross-examination of the Respondent's witnesses regarding their conduct at other jobsites. It is relevant to motive that Respondent agents at other locations committed prior unfair labor practices of the same type as alleged here. *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393,395 (1998).

recommended Order as modified.[4] As set forth below, the General Counsel alleged, and the judge found, that the Respondent discriminatorily refused to consider and hire 120 discriminatees at two Respondent jobsites based on their status as voluntary union organizers,[5] and engaged in other

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Finally, we find that the judge properly relied on Rule 103 of the Federal Rules of Evidence to preclude cross-examination of Gary Evenson concerning his conduct in an unrelated proceeding before a different judge.

[4] The General Counsel and the Charging Parties have excepted to the judge's refusal to grant a nationwide remedy and to order national posting and mailing to all Respondent employees and applicants. Based on our conclusion, set forth infra, that the Respondent's hiring criteria, as applied, unlawfully discriminated against union activist applicants in Arizona and Louisiana, and our earlier decisions making similar findings with respect to other Respondent jobsites in other parts of the country, *see* fn. 6, infra, we find merit in these exceptions and modify the Order accordingly. Additionally, we correct the judge's inadvertent errors in omitting his recommended testing remedy from the Order and in misspelling discriminatee Ronnie Penny's name in the Order.

The General Counsel and the Charging Parties have also excepted to the judge's failure to grant certain additional remedies, including union access to company bulletin boards; furnishing a list of employee names and addresses to the Unions; maintenance of applications and statements explaining reasons for hire or rejection, and inspection of those records by Board agents; and establishing, following, and posting at all construction jobsites a uniform and fair employment application and hiring policy. We decline to order those remedies.

Issues concerning the applicability of *Dean General Contractors*, 285 NLRB 573 (1987), to the instant case can be raised in the compliance proceeding.

[5] The General Counsel also alleged that the Respondent unlawfully refused to consider and hire five union activist applicants for rebar helper positions at the Louisiana site; however, the judge recommended dismissing those allegations. Because we agree, for the reasons stated infra, that there was insufficient evidence to support the refusal to hire allegations, we adopt the judge's recommendation and dismiss those allegations. We reverse the judge, however, and find that the Respondent did unlawfully refuse to consider those five applicants for rebar positions.

related coercive or discriminatory conduct. We agree with the judge's conclusions for the reasons stated herein.

INTRODUCTION

This is the third in a series of cases alleging that the Respondent's hiring practices have unlawfully discriminated against applicants for employment who evinced an interest in exercising rights protected by the Act.[6] The Respondent, which operates on a nonunion basis, is a large construction company. The Respondent has for many years maintained a detailed, written protocol governing hiring standards, policies, and procedures for craft employees. The protocol, which

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[6] These four proceedings are summarized below:

Fluor Daniel I: 304 NLRB 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992). The Board ordered employment offers and backpay to 13 discriminatees who applied for employment at a project in Georgia.

Fluor Daniel II, 311 NLRB 498 (1993), enfd. in part, remanded in part, 161 F.3d 953 (6th Cir. 1998). The Board ordered employment offers and backpay to 55 discriminatees who applied for employment at various Respondent jobsites in Kentucky. The United States Court of Appeals for the Sixth Circuit affirmed the Board's theory of the violation, but remanded the case for determination whether specific vacancies existed that the discriminatees could fill. The Board has accepted the remand.

Fluor Daniel III : the case before us. The consolidated complaint alleges that in order to discourage employees from engaging in protected activities the Respondent refused to consider or hire the discriminates and gave "preference for hiring to former employees and to applicants recommended by its supervisors, agents, and cmplayees."

Fluor Daniel IV: This complaint, currently pending trial, makes the same hiring preference allegations as *Fluor Daniel III* with respect to 130 job applicants at two Respondent projects in Louisiana. Complaint in *IV* issued while *III* was in trial. The General Counsel moved to consolidate *IV* with *III*. The Respondent opposed the motion and the judge denied it, noting that additional delay would be unfair to the parties in *III*.

is facially valid, accords preference in hiring to former employees who have been certified though the Respondent's in-house craft certification program. In this case, and in the two earlier proceedings, however, the scope of the preference was expanded, without the authorization that the protocol required,[7] to include any applicant who had previously worked for the Respondent.

In the two earlier proceedings, *Fluor Daniel I and II*, the General Counsel did not challenge the hiring preference system. There the General Counsel alleged only that the Respondent had unlawfully discriminated among applicants who were not former employees by giving favorable consideration to those who were not voluntary union organizers, while excluding from consideration those who were. In those cases, the Board concluded that the Respondent had engaged in the discrimination alleged and had "offered no credible reasons" for treating applicants disparately.[8] One of the factors underlying the Board's conclusion in *Fluor Daniel II* was that the Respondent had disparately enforced a rule limiting the effective period of employment applications so as to exclude union activists on the ground that their applications had expired. The same "inactive application" rationale is asserted as a defense in the case before us.

In this proceeding, *Fluor Daniel III*, the General Counsel alleges that the Respondent systematically applied its hiring preferences and policies to screen out union activists from

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[7] The Respondent's craft hiring rules were codified in its human resources manual, in effect since at least 1972. Modifications to hiring policies and practices require written approval from the vice president for human resources. The human resources manual was never modified to extend it hiring preference to noncertified former employees, nor did the vice president for human resources approve such a policy change. The same is true for all other deviations from company hiring policy at issue or relied on as defenses in this case.

[8] *Fluor Daniel II*, 311 NLRB at 500; *Fluor Daniel I*, 304 NLRB at 971.

consideration and to mask their exclusion with the guise of legitimacy. Thus, the General Counsel now alleges that the Respondent discriminated against voluntary union organizer applicants by treating them less favorably than all other applicants—not only nonactivist, nonpreferenced applicants, but also preferenced former employees. Accordingly, we now examine the Respondent's entire hiring system as the Respondent applied it at its Palo Verde Nuclear Generating project near Phoenix, Arizona, and at its Exxon refinery site at Baton Rouge, Louisiana. There are two evidentiary factors not available in prior proceedings: an emerging pattern of discrimination, and subsequent documents and testimony evidencing discriminatory intent at the corporate level.

On the basis of discriminatory corporate policies and field practices implementing them at the two jobsites, we conclude that the Respondent unlawfully applied its system of hiring preferences, policies, and procedures so as to refuse to consider or hire 120 voluntary union organizers who applied to work there.[9] We also find that the Respondent engaged in associated threats, coercive statements, and retaliatory conduct.

I. CORPORATE POLICIES

We address first the Respondent's corporate level preparations for staffing the two projects. The Respondent, Fluor Daniel, is the nonunion subsidiary of Fluor Corporation, a holding company that also has a union subsidiary, Fluor Constructors. Fluor Daniel has a non-union subsidiary called TRS. FIuor Constructors, Fluor Daniel, and TRS are all separate corporations with separate boards, oficers, labor relations, and personnel policies. Fluor Daniel extends its

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[9] Because we find that the Respondent applied its hiring policies and preferences in an unlawful manner, we find it unnecessary lo reach Charging Parry Boilermakers' argument that the Respondent's hiring policies were inherently destructive of protected rights, and invalid per se.

hiring preference to former employees of nonunion TRS, but not to former employees of unionized Fluor Constructors or to its own former employees from direct-hire union jobs.[10] The rationales offered by corporate officers for excluding unionized former employees were that unionized employees were not employees of Fluor Daniel but of the Union or that such employees would be loyal to the Union and not to the Respondent.

The Respondent's hiring preference was originally codified in its craft employee hiring manual, a part of the Respondent's human resources manual, and favored only those certified through Fluor Daniel's in-house certification program. Company certification requires 42 months of craft experience and passing a test[11] Other relevant craft hiring policies provided that applications expired after 60 days and had to be submitted in person.[12] Modifications to craft hiring rules required written approval by the vice president for human resources.

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[10] On rare occasions, when a contract requires it, the Respondent has hired—as its own employees—a unionized work force. Typically, however, Fluor Daniel staffs its projects with nonunion direct hires or by contracting the work out.

[11] The 42-month experience requirement functioned as the equivalent of journeyman status. It was also stated to be a minimum requirement for nonformer employee applicants seeking journeyman work.

[12] As noted, the Respondent's hiring protocol provided that craft applications remained valid only for a period of time, i.e., 60 days. That rule is not attacked as discrimininatorily motivated. In compliance with the protocol, the 60 day period applied to applications submitted at Palo Verde. It would have applied at Exxon as well, but as discussed infra, sec. 1B, a directive from industrial relations reduced the period to 30 days just prior to the commencement of hiring. Although the reduction at Exxon is not alleged as an independent violation, it is relied upon as a factor supporting the allegations of discriminatory refusal to consider and hire. Finally, as discussed infra, the rule at both places was discriminatorily applied.

At the jobsites involved in this and the two preceding cases, the hiring preference had in practice come to be extended to any craft applicant who had previously worked for Fluor Daniel, with those who were certified ranking above those who simply had Fluor Daniel experience. Additional rules adopted in the field were that applications would not be accepted unless positions were open,[13] and that applicants could apply and be considered for only one position. The vice president for human resources did not approve these hiring policy deviations.[14]

In 1993, the Respondent bid on the two jobs involved in this case: the Exxon refinery project in Baton Rouge, Louisiana, where the Respondent rebuilt a coker plant that had been destroyed by fire, and the Palo Verde project, where the Respondent took over maintenance of a nuclear power plant outside Phoenix, Arizona. Palo Verde Nuclear Generating Station, the largest nuclear power facility in the United States, was built by Bechtel Corporation, a well known union contractor, and—until the time of the Respondent's successful bid—had been maintained by Bechtel under successive contracts with Arizona Public Service Company (APS).[15]

A. Palo Verde

Prior to bidding on the Palo Verde job, the Respondent performed a wage survey of the Phoenix area. The survey stated that the Respondent would need to rely on other parts

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[13] The Respondent's protocol does not relate the commencement of an application's effective period to the existence of actual job openings at the time of its submission. In any event, this uncodified field rule at Exxon and Palo Verde prohibited recruiters from accepting applications unless opening existed at that time in the craft applied for. At Palo Verde, the rule appears to have been communicated orally. At Exxon, it was included in the Martinez memo, infra, sec. 1B.

[14] *See* fn. 7, supra.

[15] APS oversees utility companies in the State of Arizona.

of the country to find "open shop" metal craft employees with nuclear experience, because hiring locally in those crafts presented the Respondent's "greatest risk" of picking up union workers.[16] In contrast, the survey concluded that workers in trades that were not organized in the Phoenix area, such as painting, carpentry, and utility, could be obtained without looking elsewhere.

The Respondent's bid to Arizona Public Service, called the Palo Verde Staffing Plan, stressed to APS that the Respondent had successfully made the transition from union shop to open shop many times, and that it would work with APS to do the same at Palo Verde. The Staffing Plan assured APS that "open shop" would guarantee that employees would be loyal to APS and Fluor Daniel—rather than to the union—and emphasized that the Respondent had a national network of nonunion craft workers from which it would recruit to fill positions at Palo Verde.[17] The Respondent's bid acknowledged the value to the client of prior nuclear experience and represented that the Respondent would canvass the present, experienced Bechtel employees for nuclear workers with acceptable skills and "philosophies." The Respondent admitted that it did not make an effort to recruit from the unionized Bechtel work force.

B. Exxon

The Respondent was awarded the Exxon contract in 1993. In December 1993, its industrial relations department issued a

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[16] In view of the significant evidence of animus in this case, we are not persuaded by the Respondent's assertion that the "risk" identified in the wage survey referred only to the "open-shop, direct-hire" wage structure it was contemplating.

[17] Should the pool be inadequate to staff the job and advertising become necessary, the Respondent's bid outlined three nonunion target groups: nonunion workers working under permit from an incumbent union, employees of other open-shop contractors, and Phoenix area nonunion craft workers who typically traveled elsewhere for work.

memorandum to human resources, an object of which was to "protect ourselves from unfair labor practice charges." The memorandum, which advised that "it is essential that this [sic] criteria be strictly adhered to," directed Exxon recruiters to implement new restrictions on the hiring process, the most important of which was to reduce the period during which applications were considered active from 60 to 30 days.[18] None of the recruiters or corporate officers who testified articulated a business justification for cutting the active application period in half, Senior Industrial Relations Specialist Ed Martinez, who wrote the memorandum, testified that each of the hiring practices it directed was for the purpose of remaining nonunion on direct-hire jobs.

C. Both Sites

Exxon staffing commenced in January 1994; by December 1994 when the project ended, the Respondent had hired nearly 2800 employees. The Respondent began staffing the Palo Verde project in June 1994; by February 1996, it had hired 962 craft employees on core and outage crews.[19] Both projects relied heavily on telephone and mailgram recruiting. Most mailgrams were directed to out-of-state recipients. Exxon recruiters continuously solicited applications from former employees by accessing the Respondent's craft availability database, calling jobsites that were closing down, and maintaining a telephone log of all individuals who called looking for work. Palo Verde recruiters also routinely used the data- base to access histories of preferenced applicants; in addition, they engaged in extensive telephone solicitation of persons who had never worked for Fluor Daniel and had no

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[18] No authority entitled industrial relations personnel to make human resources policy changes. See fn. 7, supra. Applications in use at Exxon stated that they were valid for 60 days. Witnesses explained that here had been no time to order new forms.

[19] There were two outages a year when the reactor was shut down in whole or in part for refueling and maintenance.

application on file. Large proportions of both work forces were made up of employees from outside the area and outside the state. Significant percentages of those hired at Palo Verde had no prior nuclear experience.[20]

II. VOLUNTARY UNION ORGANIZERS

Once it became known that the Respondent had the Exxon and Palo Verde jobs, area trade unions decided they would allow members to apply for work at Exxon and Palo Verde as voluntary union organizers. At both sites, participation in the organizing effort was voluntary and uncompensated. Voluntary union organizers agreed to accept employment if offered, to stay until laid off, to do a good job, and not to engage in aggression or sabotage. Participants agreed to discuss the benefits of union representation with other employees and to record notes of actions that appeared to interfere with protected rights.[21]

In Baton Rouge, IBEW Local 995 Business Agent Kendrick (Ricky) Russell and Pipefitters Organizer Jeff Armstrong coordinated the organizing effort. Participants

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[20] We note here that wherever we consider hiring statistics at either site, and the figures submitted by the parties differ, we have used the Respondent's data. We thus analyze the case in the light most favorable to the Respondent. This does not imply that we have accepted the Respondent's figures as more accurate.

We find without merit the Respondent's exception contending that evidence of statistical disparities cannot properly be considered, because the disparate impact theory used in Title VII proceedings is not available under the NLRA. We believe that the evidence, quite apart from the statistical data, supports the violations. The statistical data show the predictable consequences of that discrimination.

[21] We find without merit the Respondent's contention on exception that a purpose of the organizing campaigns at Exxon and Palo Verde was to force the jobs to close down. We also note that there is neither evidence nor claim that union organizers, voluntary or paid, engaged in disruptive practices, broke laws, or committed unfair labor practices at Exxon and Palo Verde.

came primarily from IBEW Local 995, Pipefitters Local 198, and Boilermakers Local 582. Boilermakers Organizer Gary Evenson coordinated the organizing effort at Palo Verde, Participants came primarily from Boilermakers Local 627, Millwright Local 1914, Ironworkers Local 75, Asbestos and Insulators Local 73, Electricians Local 640, Cement Masons Local 394, and Carpenters Local 408.

At both sites, the alleged discriminatees traveled to the recruiting offices in groups, ranging in size from 2 to 26. They wore union hats, shirts, and buttons. They identified themselves on their applications as voluntary union organizers. Their applications contained other indicia of union affiliation, including their apprenticeship training, past employment with union contractors, listing union scale as wages, and providing union officers as references.

III. HIRING AT EXXON

A. Application Process

Staffing at Exxon commenced with 3 weeks of open recruiting. Between late December 1993 and January 19, 1994, Exxon recruiters accepted nearly 700 applications in all crafts, regardless of whether there were openings in the craft or whether the applications were likely to be acted upon in the next 30 days. This included applications from electricians and pipefitters—the alleged discriminatees' crafts. The Respondent did not anticipate significant hiring in those trades for another 3 months.[22] Senior Site Manager Bill Austin testified that he implemented open recruiting because he thought it would be prudent to have a reserve of qualified applicants to draw on during anticipated peak times. He acknowledged that accepting open applications violated both

[22] Before wiring or piping could take place the building shell needed to be reconstructed. Peak demand for electricians and pipefitters was anticipated to arise in April, May, and June.

the Respondent's hiring rules and the Martinez memo and that he had not received authorization for these deviations from company policy. Austin further testified that the 30-day rule operated at cross-purposes to hiring the most qualified applicants.

On January 19, the position of "Electrician" was posted on the job notice board outside the Exxon recruiting office. That day the first union electricians arrived at the site and applied for employment, wearing union insignia and noting on their applications that they were voluntary union organizers. The next day, the "Electrician" posting came down and open recruiting ceased.

On five other occasions between January 25 and May 10, groups of voluntary union organizers submitted applications at the Exxon recruiting office.[23] All of the alleged discriminatees were well qualified[24] with many years of craft experience. None of them was hired, interviewed, questioned, or contacted.[25] Recruiters did not tell the alleged discriminatees

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[23] In addition to the 10 electricians who applied on January 19, 4 electricians applied on Janunry 25, 5 electricians on January 26, 7 pipefitters and 8 boilermakers on February 1, 1 pipefitter on February 2, 2 electricians on April 19, and 4 pipefitters on May 10. In addition, one electrician applied on July 20 and five applied on August 28, 29, and 30.

[24] The single exception was Donald Broussard, an electrician who applied an April 19. The judge dismissed as to Broussard, finding that based on his application, which did not reflect work in the trade during the previous 2 years, together with his youth, Broussard did not appear qualified. There were no exceptions to these findings or to the dismissal, which we adopt pro forma.

[25] Austin and David Bordages, the Respondent's vice president for human resources, construction division, testified that they would expect recruiters to review applications, tell applicants if something was wrong, and-preferably while he applicant was still there—ask questions and get clarification, if needed, about work experience. The alleged discriminatees gave their applications to recruiters Glover and Wilson. Glover and

that applications were valid only for 30 days or that journeyman applications had to reflect 42 months of craft experience.[26] Recruiters reviewed and accepted the alleged discriminatees' applications without indicating that they failed to meet minimum hiring requirements. Those discriminatees who specifically asked if their applications were complete or "OK" were told nothing to alert them to the disqualification rules. When alleged discriminatees made follow up calls, recruiters pulled their applications and reviewed them with the callers, but did not advise them that their applications were deficient. Recruiters did inform them that their applications had expired because they were more than 30 days old, and that they could not renew them or reapply because their crafts were not then posted.

In August, the Respondent hired two open union activists. Late that month, Ed Martinez from industrial relations told recruiter Rhonda Glover that it would improve the chances that NLRB Region 15 would not issue complaint against the Respondent if the Respondent could show that it had hired some union-affiliated applicants. On August 29, Glover called Charles Dame, an open union activist who had applied that day, and asked him to come into the office and expand his application by listing 42 months of job experience. Dame had not been told of the 42-month requirement when he filed his application. The next day Dame completed a second application and was hired. Also on August 29, IBEW Business Agent Ricky Russell, came in and applied, responding to an ad for electricians in the previous day's paper. Glover hired Russell. Russell had not been hired on January

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Wilson did dot follow these practices with respect to the alleged discriminatees.

[26] On April 19 recruiters instructed five union rebar helpers and two union electricians that applications must reflect 42 months experience. This single instance occurred shortly after the first charge was filed.

19 when he had applied as a voluntary union organizer. These union activist hires took place 1 months after the Exxon project commenced and 4 months after its originally anticipated peak need for electricians.

B. Defenses

The Respondent gave three primary reasons for not hiring the alleged discriminatees at Exxon: that they were not preferenced,[27] that their applications had expired when positions in their crafts became open, and that their applications did not reflect 42 months of craft experience. For the reasons set forth below, we conclude that these reasons are pretexts.

1. Hiring preference defense

Nearly one-fifth of Exxon journeymen hires were nonpreferenced applicants. Thus, the Respondent's failure to hire the alleged discriminatees cannot be explained solely on the basis of hiring preferences. Further, as seen below, the manner in which the Respondent implemented its hiring preferences is evidence of antiunion animus.

The Respondent routinely made exceptions to its hiring rules in favor of preferenced applicants, both those who were certified and those who had merely worked for the company before.[28] The Respondent's craft hiring protocol does not

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[27] One alleged discriminatee, Boilermakers International Representative Kenny Bueche, was a preferenced former employee; the Respondent stated that it did not hire him because it did not have his application. The judge credited Bueche that he had submitted an application and found that the Respondent had in its possession other applications submitted with his.

[28] The Fluor Daniel experience Preference benefited any applicant who had ever worked for the Company, including those whose employment had been brief, remote in time, or shorter than 12 months. Mailgram solicitations were sent to former employees who had not worked for the Company in 10 years These individuals were treated to the same priority as certified applicants, thus, placing them above nonpreferenced appli-

exempt preferenced employees from compliance with application procedures and minimum employment standards.[29] In contravention of the protocol, however, recruiters hired fanner employee applicants who did not have 42 months of craft experience, who had been certified in crafts other than those in which they were hired, who had never submitted applications or whose applications had expired, or who were considered for crafts other than those they had applied for. Recruiters made no exceptions to these rules that would have benefited alleged discriminatees.

Finally, the asserted basis for the hiring preference was the Respondent's desire for employees with proven skills and work records. Nevertheless, under the preference's aegis, the Respondent hired seven former employees whom it knew to have been convicted of violence and weapons crimes or to have been terminated, some more than once, for absenteeism, insubordination, substance use, or endangering safety. In light of other disparities, discussed infra, we conclude that the Respondent accorded preference in hiring to at least some former employees based, not on its knowledge of their skills and work records, but on their perceived attitudes toward union organizing.

2. Inactive application defense

The 30-day rule was the one to which the Respondent attached the most importance. The Respondent instructed recruiters never to deviate horn the 30-day rule. Neither recruiters nor Austin explained why, other than that it was a "good rule." The Respondent adhered to the 30-day limi-

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cants who had more experience, and who had actually come to the hiring center in person to apply.

[29] Preferenced applicants would appear to be the natural objects of the Respondent's hiring policies; the Respondent's goal, expressly stated and effectuated through vigarous recruitment efforts, was to hire as many former employees as possible.

tation, even when it was apparently against financial self-interest to do so. From August through October, the Respondent experienced persistent difficulty staffing the Exxon project with pipefitters, pipewelders, and electricians. The Respondent resorted to advertising in local and out-of-state papers, sent 23,500 mailgrams soliciting applications from former employees, and subcontracted with three nonunion subcontractors to do electrical, pipefitting, and pipewelding work for which it had insufficient staff. Austin was asked why he had not turned to the alleged discriminatees' applications, which were still on file in his office. Austin testified that, although other hiring rules were breached on a regular basis, he would never consider an inactive application, even if it meant failing to staff a job properly.

The Respondent did not establish that it made efforts to advise the alleged discriminatees of the 30-day rule. It is undisputed that a sign somewhere in the hiring office contained a notice to that effect; however, the Respondent did not establish that the alleged discriminatees had seen it or that this critical rule had been communicated to them in any more direct way. Recruiters did not instruct the alleged discriminatees that their applications would be ineligible for consideration after 30 days, nor did the application forms give effective notice. The forms contained a small printed line stating that applications were valid for 60 days. When the alleged discriminatees' applications were submitted into evidence at trial, the "60" had been crossed out and "30" had been substituted by hand. The alleged discriminatees consistently testified that there were no cross-outs on the forms they submitted or that they had noticed none. No evidence suggested that the forms of nonactivist applicants had been altered without: their knowledge.

Although the 30-day rule was enforced more rigorously than other rules, deviations in favor of nonactivist applicants occurred: 27 journeymen were hired more than 30 days after

they applied. An additional 29 were hired before they applied, for a total of 63 journeymen (4 percent of journeyman hires) whose hires represented breaches of the 30-day rule or the rule against hiring before an application was submitted. No union activists benefited from similar rules breaches.

3. Insufficient experience defense

The Respondent argues that it required journeyman applicants to have 42 months of craft experience, and that as the alleged discriminatees' applications did not reflect this minimum experience, they were not considered.[30] The Respondent's recruiters did not inform the alleged discriminatees that failure to list 42 months' craft experience on their application forms would disqualify them[31] and the Respondent's application forms did not contain instructions to that effect. The application forms, which provided six lines for applicants to list all jobs held in the preceding 3-1/2 years, were not conducive to recording an extensive work history. Uncontroverted evidence showed that jobs in the alleged discriminatees' trades are typically of short duration, often a matter of weeks. One witness testified that a full 3-1/2-year record would require an application the size of a telephone book. The alleged discriminatees were not offered supplemental sheets or told that they were available.

Most of the alleged discriminatees had been working in their trades for 20 or 30 years and had sought employment many times. They typically filled in the six spaces or listed

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[30] *See* fn. 11, above, concerning 42 months' experience and journeyman status.

[31] Two of the Respondent's recruiters testified that they gave all applicants standard instructions, including that applications for journeyman positions must reflect 42 months of craft experience and that supplemental sheets were available to list additional work history. The judge discredited this testimony. As set forth in fn. 26, above, he found that such instructions had only been given once, after most of the alleged discriminatees had already applied.

their last few jobs; there was no evidence that this deviated from construction industry practice. As noted above, many alleged discriminatees testified that they had requested recruiters to review, their applications for sufficiency before accepting them. None was told then or later that they had listed too little experience. Further, many alleged discriminatees, with recruiter approval, attached resumes to their applications that contained complete job histories. Recruiters ignored their resumes and counted only employment that was written on the application form itself, Thus, the judge found, and we agree, that had the alleged discriminatees been told of the 42-month requirement, they could and would have supplied the requisite information.

The Respondent counted training at its own craft school toward the 42-month requirement,[32] but gave no credit for the discriminatees' union apprenticeship training. The alleged discriminatees' applications consistently show 48-month apprenticeships, which exceed the 42-month requirement. The Respondent's recruiters failed to provide consistent or convincing explanations why they gave no credit for union apprenticeships but accorded full credit to company training, which in many instances was less extensive.[33] Accordingly,

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[32] Two years of instruction at the Respondent's craft school was often accepted in lieu of 42 months' experience. In addition, former employees who had some craft experience and some craft school training were accorded full credit, even when combined work and school experience fell well short of 42 months.

[33] Recruiters variously stated that they did not know what an apprenticeship was, that they did not realize that apprenticeships involved on-the-job work, or that they gave union apprenticeships half credit. The judge discredited the testimony of the Respondent's experienced recruiters that they were unaware of the nature or duration of union apprenticeship programs.

we find that the alleged discriminatees' applications reflected the requisite 42 months' experience.[34]

No applicants but the alleged discriminates were held so inflexibly to the 42-month standard, Substantial numbers of former employees listed less than 42 months' experience on their applications. Recruiters attempted to explain the anomaly by stating that former employees were included in a companywide database that recruiters could check to see if such applicants had more experience than their applications reflected. There was no explanation why recruiters hired 43 former employees whom the database showed to have less than the requisite journeyman experience; of these, a significant number had 6 months' experience or less. There was no supported explanation why the Respondent hired as journeymen 124 nonpreferenced applicants whom applications showed less than 42 months' experience. Recruiters sug-

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[34] The experience of Jeff Armstrong, an experienced pipefitter and paid Pipefitter organizer, illustrates this point. On February 1, Armstrong applied for a posted position as an ironworker. It is not disputed that pipefitters routinely do ironwork, which in general requires less skill than pipefitting. Armstrong listed his pipefitting employment, but specifically asked Teri Wilson, the recruiter who accepted his application, if he should go back and identify the jobs where he had performed ironwork. She told him that that would not be necessary. At the trial, Glover testified that Armstrong was "underqaulified" for the job because his application did not list 42 months of ironwork experience.

Armstrong's experience is noteworthy for another reason. Armstrong applied a total of four times. In addition to the February 1 application, Armstrong applied on April 19 for a posted pipefitter helper position, but was rejected as "overqualified." On May 10 Armstrong and four other pipefitters applied to take the pipefitter certification test that the Respondent was administering that day. Because he and the others were not former Fluor Daniel employees, they were considered "not qualified" and were not allowed to test. (We agree with the judge that these five applied for employment as well as to test on May 10.) Finally, on July 20 Armstrong applied for the posted position of instrument helper, and was rejected as "overqualified."

gested that an "unwritten" exception for applicants referred by members of management, supervisors, or other employees could account for it. Testimonial evidence, however, linked only a handful of these hires to internal referrals, leaving the rest unexplained.[35] No similar rules breaches favored alleged discriminatees.

4. Other deviations from the hiring protocol

Having examined the Respondent's three main defenses, we turn to other deviations in hiring practices at Exxon. Pursuant to hiring procedures implemented in the field, craft applicants could submit only one application and could be considered only for the one position that the application sought. The Respondent's statistics show that the Respondent considered nearly two-thirds of all applicants for positions other than those for which they had applied.[36] None of these were alleged discriminatees. Numerous applications contained multiple deviations. Two-thirds of craft employees hired prior to submitting applications had inadequate experience and two-fifths were considered for a different craft. Three-quarters of craft employees hired more than 30 days after they had submitted applications had inadequate experience and four-fifths were considered for other crafts. Of noncertified former employees with less than 42' months' experience, nearly two-thirds were considered for other crafts. All told, the Respondent's data revealed over 3000 known deviations from the Respondent's rules with respect to the hire of nonactivists. The same rules were applied to disqualify all alleged discriminatees from consideration.

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[35] There was testimony to the effect that perceived nonunion applicants were given names of supervisors they had never met to use as "referral" sources in applying for work; however, this subject was not developed in depth.

[36] Even taking into account some inflation in his number because the Respondent included misspellings and minor differences in position name, the percentage of rule violations in this category is significant.

C. Related Violations

There were two related violations at Exxon, and an event that, although not independently alleged to be unlawful, sheds light on the motives underlying the Respondent's hiring practices. All three incidents concern Dame and Russell, the two activist hires. Shortly after Russell's hire on August 30, Respondent Foreman Clint Bamber[37] told a group of employees that he had something to tell them that could get him in a lot of trouble, but that he felt they had a right to know who their co-workers were. He said that Ricky Russell had been hired, and that the hiring office must not know what they were doing, because Russell was the business agent in Baton Rouge. Bamber told the group that he wanted to get Russell on his crew so that he could get rid of him. There was no allegation concerning Bamber's statements.

About a month later, another foreman threatened Dame. During the month that Dame worked at the Exxon site he raised safety concerns about ladder stability and placement of power cords and welding leads. As a result, a scaffold was built and Dame moved cords and leads. Dame also questioned management about emissions from the coker that caused employees to feel nauseated and breathless. The morning of October 6, Dame questioned his foreman and a safety officer about the steam. He was told that the steam had been tested and that they would get him the results. When later that morning Dame had still not heard the results, he spoke to his foreman again. He was sent to the safety trailer, where he was told they might not want him to go back to work until they got the information, He spent most of the rest of the morning being referred to, and waiting for, various management personnel. Prior test results were not produced. When he went back to the job, several other employees asked him about the steam situation. Around noon, Dame was taken to the

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[37] The Respondent stipulated that Bamber is a supervisor.

emission site and a steam sample was collected. Dame was then sent back to work.

On his way back, Foreman Chuck Robinson,[38] who was not Dame's foreman and for whom Dame had never worked, approached Dame and told him to "quit fucking up." Dame had never been disciplined or told that his work was deficient. Dame said, "What do you mean by that?'' Robinson replied, "You know what I mean," Dame asked, "Do you mean about the steam?" Robinson smiled and walked away. The next day Dame asked him again what he meant, but Robinson denied ever talking to him. The judge discredited Robinson's testimony and found that Robinson's statements constituted an unlawfull implied threat. We agree. We reject the Respondent's argument that this incident is not unlawful because Robinson had no hiring authority[39] and find that Robinson's statements threatened unspecified retaliation in violation of Section 8(a)(1).

Shortly after the Robinson threat, Dame announced that he was joining Russell in an asserted unfair labor practice strike protesting the Respondent's failure to hire union affiliated applicants. While he was on mike, another contractor at the Exxon site, J. E. Merit, hired him. Dame did not work for Merit, however. Merit was unable to get him an Exxon security badge because the Respondent refused to turn in the badge giving Dame access to its site. The badges are the property of Exxon; their purpose is to account for personnel in emergencies, Therefore, Exxon does not allow an employee to have more than one badge, and requires that all temporary absences, including transfers, leaves, suspensions, and strikes, be reported to Exxon security. Exxon would then determine whether the badge should be turned in.

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[38] The Respondent stipulated that Robinson is a supervisor.

[39] *See Quality Control Electric*, 323 NLRB 238, 239 (1997).

The Respondent did not report Dame's absence to Exxon. Exxon security did not learn of it until J. E. Merit requested a badge for him. An Exxon security officer explained security and badge policies to the Respondent's administrative site manager, Joe Ferrer, including that Dame could not work for J. E. Merit unless Fluor Daniel returned his badge. Ferrer refused to release the badge. At trial, Ferrer testified that it was against company policy to release the badge of a current employee. We find that this is a pretext. We conclude that Ferrer disregarded Exxon security policies in order to further its end of retaliating against Dame and find that the refusal to release the badge, which was the property of Exxon, violated Section 8(a)(3) and (1).

D. The Complaint's Allegations Regarding Rebar Helpers

The judge dismissed the complaint's allegations that the Respondent discriminatorily refused to consider and hire applicants for posted-rebar-helper positions. The General Counsel and the Charging Parties excepted.

Five members of Pipeliners Union Local 692 went to the Exxon hiring office on April 19 (the day Armstrong and Broussard applied) and applied for work in posted-rebar-helper positions. Like the other discriminatees, all five were highly qualified and had substantial experience. None of the five was hired. Unlike the situation affecting the other discriminatees, no rebar-helper applicants were subsequently hired into the positions posted. Although two incumbent employees (nightshift laborers) were offered transfers into the higher paying-rebar helper positions in July, no outside hiring occurred. The General Counsel alleges that these infernal transfers were camouflaged hires. We find, however, that in these circumstances, the evidence is insufficient to establish that the Respondent unlawfully refused to hire the union-rebar applicants. Accordingly, we find no merit in the exceptions insofar as they relate to the Respondent's alleged refusal to hire the five-rebar-helper applicants. However, as

set forth at the conclusion of section V of this Decision and Order, we find that the Respondent unlawfully did refuse to consider these five applicants for hire to rebar-helper positions.

IV. HIRING AT PALO VERDE

As at Exxon, at Palo Verde the Respondent claims that it did not consider or hire the alleged discriminatees because they never applied when positions were open and, when positions were open, their applications had expired. The Palo Verde argument does not parallel that at Exxon in all respects, however, because as long-term Bechtel employees with highly specific craft experience and close familiarity with APS facilities and procedures, they were clearly qualified applicants. The Respondent does not contend to the contrary. Nevertheless, the Respondent hired none of them. We now consider the hiring practices that led to that result.

A. Alleged Discriminatees' Qaulifications and Experience

The alleged discriminatees, all of whom had worked for Bechtel under a union collective-bargaining agreement,[40] submitted applications at Palo Verde during the 12-day period between June I6 and June 27, 1994.[41] All of them had worked at Palo Verde for many years in the Same jobs for which they were appling.[42] The alleged discriminatees had all worked

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[40] The one exception was paid organizer Gary Evenson, who had never worked at Palo Verde but was a highly experienced boilermaker.

[41] On June 16, 16 boilermakers, 2 ironworkers, and Insulator applied; on June 20 12 millwrights, 1 ironworker, and 2 boilermakers; on June 21, 2 boilermakers; and on June 23, 9 millwrights, 3 ironworkers, 1 boilermaker, 2 insulators, and 1 electrician. On June 27, 26 others attempted to apply; these included 10 insulators, 3 boilermakers, 3 carpenters, 3 ironworkers, 2 millwrights, 2 cement masons, 1 sprinkler fitter, and 2 painters.

[42] Some were applying for jobs they were still performing; the last Bechtel employee did not leave the facility until early July.

inside the reactor containment performing hazardous work that required superior training and skill. Refueling the reactor entailed removing the reactor head and disassembling the system, inspecting its components, repairing and reinsulating as needed, and reinstalling the entire system in reverse order. Maintenance entailed welding or replacing cracked, worn, or damaged parts and insulation materials in the reactor, the control rod assemblies and coolant pumps, the radiation waste tank system, the containment shell and penetration sleeves, and the fuel transfer tube, pod liner, and spent fuel storage racks, and in the attached steam generators and related equipment.[43]

Because of the nuclear risk, all Palo Verde employees underwent background investigations and were assigned security clearances and escorted or independent (unescorted) status. Background checks for new employees took several weeks to complete. Update checks on employees returning for outages took less than a week. The alleged discriminatees had all achieved independent worker status and had high-level clearances that admitted them to the reactor containment, the control room and secondary alarm system, or the central alarm station.

APS operated its own training program through which Palo Verde employees, including the alleged discriminatees, regularly updated their skills and certifications and reviewed APS procedures for radiation protection and safety. APS kept computerized records an each employee detailing courses completed, licenses and certifications, independent status, and clearance level. These records were easily and readily

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[43] The containment housed the entire system for converting nuclear energy into electrical power. This included, in addition to the reactor system, a massive overhead crane assembly, two steam generators, the pressurizer, and the condenser. A multi-ton missile shield protected the containment and its contents.

available to the Respondent, The Respondent did not request them.

Contrary to its representations to APS when bidding on the project,[44] the Respondent did not review the incumbent Bechtel work force for qualified employees nor make any effort to recruit from that source. The Respondent did recruit extensively from other sources, including individuals who had never worked for the Respondent, for the Palo Verde plant, or far any other nuclear facility. Of the 111 employees hired for the Respondent's base crew, 34 (nearly one-third) had no prior nuclear experience, Including the 52 alleged discriminatees who were allowed to apply, 200 former Bechtel employees submitted applications. Of these, the Respondent hired 91. None of the 91 Bechtel hires presented indicia of union activity beyond presumed membership inferred from their employment with Bechtel. Roughly a quarter of these were hired in utility classifications, the unskilled positions that the wage survey had said could be filled locally.[45]

B. Failure to Consider or Hire the Alleged Discriminatees

As set forth in the illustrations that follow, the Respondent treated the alleged discriminatees differently from those whom it did not perceive to be union activists.

1. The first group of alleged discriminatees to arrive at the recruitment trailer applied for "boilermaker" positions. All other applicants applied for comparable work bearing different job titles, such as "equipment mechanic," "ironworker," "millwright," "pipefitter," "pipewelder," and "sheet metal."[46]

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[44] *See* sec. 1 A, supra.

[45] *See* infra

[46] There was unrefuted testimony that Bechtel metal craft employees had worked on composite crews and that all crew members could perform all aspects of the work, even those that fell outside their own trade.

The Respondent claimed that it did not have a "boilermaker" classification. The Respondent allowed 22 alleged discriminatees to apply for this nonexistent classification; it then put those applications into a dead file designated for nonbudgeted positions.

2. About June 14, union boilermaker Mark Smith, without insignia, went to the Palo Verde trailer looking for work. He was told to return the following day to apply. When he returned, recruiter Wallace told him that the Respondent would need welders very soon. On June 16, Smith and Steve Horlacher applied with a group of voluntary union organizers, who displayed union insignia. None was hired. In mid-August, Smith and Horlacher applied again, without insignia, and were hired for the steam generator jump team, In addition to Smith and Horlacher, the Respondent hired seven other mechanical craft employees for the jump team.

Recruiters told both Smith and Horlacher that the Respondent needed welders with nuclear experience.[47] At that time, the alleged discriminatees' applications were active: the first 60-day period expired on August 17, the last on August 24. The Respondent did not contact any of them. On September 8, one of the Respondent's foremen, Harry Sinclair, explained to Horlacher that no alleged discriminatees had been hired because they had written "votuntary union organizer" on their applications, Sinclair's statement was alleged to violate Section 8(a)(l). We find that it did.[48]

3. On June 27, a Monday, a final group of 26 alleged discriminatees arrived at the recruitment trailer and sought to apply. Recruiters turned them away, telling them that the

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[47] Horlacher told recruiter Koza that Evenson could supply all the experienced welders that he needed and gave him Evenson's card. Koza never called Evenson.

[48] That Sinclair did not have hiring authority does not immunize his statements. *See* fn. 39, above.

Respondent was no longer accepting applications. That same day the Respondent accepted 55 applications from non-activists.[49] Other nonactivist applicants were invited to check back with recruiters in case there were no-shows on June 27. Several did, submitted applications, and were hired. There were a total of 68 non-activist applications and hires subsequent to the Respondent's refusal to allow the June 27 discriminatees to apply.[50] At that time, all of the alleged discriminatees' applications were active. None of the alleged discriminatees was invited to check back in case of no-shows. To the contrary, a recruiter advised alleged discriminatee Hayes, a millwright, that no vacancies were expected in his craft in the next 60 days. That 60-day period—that is, mid to late summer—coincided with the time when numerous metal craft staff were traditionally hired in preparation for the September outage.

Roughly, half of all hires on June 27 were in carpenter classifications, numerous others in unskilled utility positions. Carpentry and unskilled labor were two of the three job categories that the Respondent's wage survey had said could safely be hired locally. Several metal trades personnel, both

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[49] The judge found that recruiters turned away the alleged discriminatees on June 27, while accepting applications from nonactivists. The Respondent's position on exception is that the 55 persons who reported on June 21 were not applicants, as they had previously been given hiring commitments over the telephone. The implication is that all positions had been filled when the discriminates arrived and that recruiters truthfully told them that the Respondent was not accepting applications. Even were that the case, it does not help the Respondent. It would simply add to the extensive list of instances where hiring rules were disparately applied in favor of nonactivists: the Respondent's craft hiring protocol both prohibits consideration of applicants prior to submission of applications and requires that applications must be submitted in person. If the June 27 reports had been hired before arrival, then the Respondent's statistics for persons hired before filing an application must be increased by 55.

[50] Of the 68 hires, almost none had 42 months of craft experience.

preferenced and off-the-street, were hired into nonmechanical classifications.[51] Ten or more former employees were hired in crafts in which they had not been certified and had no experience.[52] Many of the post June 27 hires had no prior nuclear experience. Some of the nonpreferenced applicants had no relevant experience.

4. In mid-July, J.D. Howell, a welder, called Palo Verde to inquire about work, giving no indication of union membership.[53] He was told they would get back to him, Howell never heard from Palo Verde. Two months later a recruiter from the Respondent's Wolf Creek nuclear project in Kansas, where Howell had never applied, called to see if Howell was interested in working at Wolf Creek. At that time, Wolf Creek had a critical shortage of welders and was offering referral rewards of up to $500. The Respondent stipulated at trial that the Wolf Creek plant had enough openings to hire all of the alleged Palo Verde discriminatees. None of the alleged discriminatees was referred to Wolf Creek.

5. Throughout the following year several events occurred that further underscored the Respondent's intention to avoid hiring the alleged discriminatees. For the January 1995 outage, the Respondent offered a per diem stipend of $35 a day to metal and mechanical craft employees who traveled more than 100 miles to work at Palo Verde. That July, a Respondent agent told alleged discriminatee Mark Winham that the Respondent needed welders and that a recruiter

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[51] Outage work was performed by metal trades personnel. One of the "carpenter" hires was a millwright. As noted in the previous paragraph, discriminatee Hayes was told that same day that there was no foreseeable need for millwrights.

[52] Two of these wrote their original crafts on their applications, but crossed them out and substituted "carpenter."

[53] Howell never applied to Palo Verde and was not an alleged discriminatee.

would call him. Recruiter Dan Owen called Winham the next day, but when Winham disclosed that he was a voluntary union organizer, Owen told him that he did not need anyone. Later that year, the Respondent experienced persistent trouble staffing the Palo Verde facility with qualified people and had to send incumbent employees out for training to improve their skills. Monthly reports from August to December repeatedly referred to a shortage of welders, trouble meeting staffing needs, and problems with poor craft training and poor knowledge of APS procedures. Later, in January 1996, the Respondent implemented an improved wage package at Palo Verde due to difficulty in obtaining employees to work there.

C. Deviations From the Hiring Protocol

There were 1261 craft applications at Palo Verde and 962 craft hires. The Respondent hired none of the 79 alleged discriminatees. There were 262 off-the-street applicants hired into the discriminatees' crafts, a hiring ratio of 27 percent. Of the 200 former Bechtel employees who were allowed to apply, the 52 alleged discriminatees represented 25 percent. The 91 former Bechtel employees who were hired came from the remaining 148 Bechtel applicants, a hiring ratio of 62 percent.

The Respondent's data, which reported nonpreferenced hires only through November 1, 1994, revealed 892 known deviations from the Respondent's hiring rules. Nine journeymen were hired before they applied.[54] Two were hired after their applications had expired. There were 88 off-the-street journeyman hires with less than 42 months' craft experience. Over 700 applicants were considered for crafts other than those for which they applied.[55] Of those considered

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[54] If the 55 applicants on June 27 are added, this number becomes 64. *See* fn. 49, above.

[55] The Respondent reported considering 755 applicants far other crafts. Nevertheless, the same proviso as at Exxon applies, supra, fn. 36, We

for Qther crafts, 53 were nonactivist fonrter Bechtel employees (almost half of whom were hired on June 27). None of the former Bechtel "boilermaker" applicants was accorded this flexibility. Further, as at Exxon, significant percentages of applications contained more than one deviation.

V. CONCLUSIONS

We find that the foregoing evidence establishes that union animus motivated the Respondent's hiring decisions at its Exxon and Palo Verde projects. We reject the Respondent's claims that its hiring decisions and protocols were based on legitimate business considerations. Our rejection of these defenses is not based on any assessment that the Respondent's hiring procedures fail to conform with reasonable business practices. "Reasonableness" is not the standard by which the Board assesses an employer's hiring system. Absent an unlawful motive, an employer may, to paraphrase the axiom, reject an applicant for "a good reason, a bad reason, or no reason at all." However, as the Supreme Court long ago ruled in *Phelps Dodge Corp v. NLRB*, 313 US. 177, 185-187 (1941), an employer may not discriminate against an applicant on the basis of union status.

The Court explained in Phelps Dodge that discrimination in hiring on the basis of union status was one of the chief obstructions to collective bargaining through self-organization and that removal of such obstructions was a driving force behind the enactment of the National Labor Relations Act. 313 U.S. at 185. As the Court stated:

> [The Act] leaves the adjustment of labor relations to the free play of economic forces but seeks to assure that the

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further reduce the number by the 22 "boilermaker" applicants. We accord no weight to the Respondent'sBechtel inclusion o f these applicants in the "considered for other crafts" category. We find that, as these applications were placed in a file for nonbudgeted positions, they were not considered for any category.

> play of those forces be truly free. . . . Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which is recognized as basic to the attainment of industrial peace.

313 U.S. at 183-185.

As summarized below, we find that the Respondent refused to consider and hire the discriminatees at Exxon and Palo Verde because of its unlawful antipathy to their union status. As the case turns on employer motive, burdens of proof are governed by Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[56] With respect to the discriminatory refusal-to-hire allegations in particular, the Board recently held in FES, 331 NLRB No. 20 (2000), that the General Counsel must establish on the merits at the unfair labor practice hearing:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants.

Id. at slip op. at 4 (footnotes omitted). Similarly, with respect to alleged discriminatory refusals to consider for hire, *FES* provides that it is the General Counsel's burden to establish:

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[56] Approved in *NLRB v. Transportation Management. Corp.*, 462 U.S. 393 (1983).

> (1) that the respondent excluded applicants From a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.

Id. at slip op. at 7. Once these elements have been established, the burden shifts to the respondent to show that it would not have hired the applicants, or considered them for hire, even in the absence of their union activity or affiliation.

Under these standards, the General Counsel has clearly established his prima facie case. As determined by the judge, whose findings we adopt, the Respondent was hiring throughout the period when discriminatee applicants applied or unsuccessfully sought to apply for employment at the Exxon and Palo Verde sites. Next, those discriminatees were well qualified and experienced applicants for the positions they sought. Indeed, in the case of Palo Verde, the discriminatees were experienced at that very nuclear facility. Finally, as set forth below, the record is replete with evidence that antiunion animus factored heavily in the Respondent's decision not to hire the discriminatees, or, as to the applicants who unsuccessfully sought to apply at Palo Verde an June 27, contributed to the Respondent's decision not to consider them for hire or hire them.[57]

Considerable evidence in this case supports the inference of unlawful motive. As set forth in the judge's decision,[58] and

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[57] The amended complaint alleges that the Respondent both refused to consider and refused to hire the discriminatees who sought to apply on June 27.

[58] We do not, however, rely on every element of the judge's rationale. Thus, we do not rely on his findings that there was no hiring preference for salaried employees, that the Martinez memo was a blueprint for discrimination, that the Respondent did not hire any of the discriminatees during the pendency of the litigation, or his conclusion that participating in litigation evidenced continuing interest in employment. We also do not rely on the judge's findings concerning Hamrick's notations about

expanded upon here, the Respondent committed prior unfair labor practices of the same type, harbored corporate level animus, made project level hiring decisions implementing its animus, and engaged in threatening and c0e;cive conduct. Based on this evidence, we find that the Respondent engaged in a pattern of systematic discrimination intended to screen out union activists from consideration for employment.[59] The practical effect of this was to allow the Respondent selectively to choose a nonunion work force by precluding employment of union activists.[60]

There is abundant record evidence that the Respondent both harbored animus and acted upon it.[61] The Respondent has a history of unfair labor practices premised on discriminatory implementation of the same hiring policies raised as defenses here.[62] High-ranking corporate officers expressed the view, well after the Supreme Court's *Town & Country*

Naccarato, Koza's failure to call Evenson for referrals, and the failure to produce Bucche's application.

[59] The Respondent asserts that the General Counsel has failed to meet its "heavy" burden of establishing systematic discrimination. The burden of establishing systematic discrimination is the same preponderance of the evidence standard that governs all *Wright Line* unlawful motive cases. See, e.g., *Norman King Electric*, 324 NLRB 1077, 1084-1086 (1977), enfd. 177 F.3d 430 (6th Cir. 1999); *Casey Electric*, 313 NLRB 774, 775 and fn. 2 (1994); *Ultrasystem Western Constructors*, 310 NLRB 545,554-455 (1993), enf.: denied on other grounds, I B F.3d 251 (4lh Cir. 1994); *D.S.E. Concrete Forms*, 303 NLRB 890, 898 (1991), enfd. 21 F.3d 1109 (5th Cir. 1994); and *KRI Constructors*, 290 NLRB 802, 811-813 (1988).

[60] See *Norman King Electric*, 324 NLRB at 1086.

[61] We reject as unmeritorious the Respondent's exceptions contending it did not harbor union animus, and that, if it did, the General Counsel failed to establish a nexus between animus and hiring decisions.

[62] Prior unfair labor practices directed at the same type of activity are evidence of continuing union animus toward that activity. *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 395 (1998).

decision discredited that argument.[63] that union organizers cannot be loyal employees, and, indeed, may not even be bona fide employees.[64] This erroneous outlook is the acknowledged rationale for the Respondent's not granting its hiring preferences to Fluor Constructor employees or to its o w direct-hire employees on union jobs. In tandem with its selective hiring preference, the Respondent maintains a national pool of former employees that it promotes to customers as a source of "loyal" labor.[65] Corporate antipathy to collective bargaining underlies key portions of the Palo Verde wage survey and the Palo Verde staffing plan[66] and is reflected in the unexplained and unauthorized decision at Exxon to change hiring policies by cutting the active application period in half.[67]

It is significant that line managers at both the Exxon and Palo Verde projects, over 1000 miles apart, had a common understanding that the Respondent's hiring policies embodied antiunion objectives. Sinclair, at Palo Verde, admitted that voluntary union organizers would not be hired. Bamber, at

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[63] The Supreme Court, in *Town & Country Electric*, 516 U.S. 85 (1995), rejected the premise that an employee who is loyal to a union cannot be loyal to an employer.

[64] Charging Party Pipefitters excepted to the judge's failure to find that the Respondent extended its hiring priority only to former employees who worked for affiliates that did not have union contracts. Although this finding is encompassed in the judge's decision, to avoid misunderstanding, we expressly so find.

[65] The term "loyal" in the context of this case is a form of shorthand for "nonunion." Similarly, in these circumstances, we construe the concept of acceptabl phies," as it was used in the Respondent's Palo Verde staffing plan, see 1A, above, as a thinly disguised reference to the prospective employees' union sentiments.

[66] See sec. 1A, above.

[67] "See *Custom Top Soil*, 327 NLRB 121, 125 (1998) (changing application policies to restrict applications by union members evidenced animus).

Exxon, thought the hiring office had slipped up in allowing someone like Russell to get through. The Respondent's field management made these corporate attitudes clear to employees through coercive and discriminatory acts. In addition, three Respondent agents connected with this case-two corporate level managers and a recruiter-also played roles in *Flour Daniel I or II.*[68]

Staffing practices at both projects reflected the Respondent's corporate animus against union activist applicants. At Palo Verde, the Respondent failed to consider the obvious and natural source of qualified workers, the incumbent work force, and recruited from elsewhere in the country to avoid the risk of hiring organized craft employees.[69] Recruiters at both projects drew heavily on the national pool of former employees, even to the extent of hiring former employees with undesirable records.[70] The Respondent went to substantial effort and expense—paying per diem to nonlocals, paying for advertising, sending mass recruitment mailgrams, and paying subcontractors-to avoid considering the qualified activist journeymen whose applications were still present in its office in "inactive files."[71] At Exxon, the Respondent relied on untimeliness as a cardinal reason for its failure to

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[68] See *Grand Rapids Press of Booth Newspapers*, 327 NLRB at 395 (repeated involvement by the same managers was evidence of animus).

[69] See *U.S. Marine*, 293 NLRB 669,671 (1989), enfd. 844 F.2d 1305 (7th Cir. 1991) (en banc), ten. denied 503 U.S. 936 (1992) (pretextual reasons for successor's rejection of highly skilled, long-term plant employees with good work records evidenced unlawful motive).

[70] See *Starcon, Inc.*, 323 NLR3 977, 982 (1997), enfd. in petinent part, 176 F.36 948 (7th Cir. 1999) (respondent's hiring of former employees with undesirable work records while ignoring union applicants with facially impressive qualifications was indicative of animus).

[71] See *KRI Constructors*, 290 NLRB at 813 (acting against financial interest concurrently with refusing to consider applicants with union backgrounds evidenced unlawful motive).

consider union activists, though it could not explain its abrupt abridgment of the active application period.[72]

The "inactive" concept, coupled with the rule against accepting applications unless there were present openings, is the central tenet of the Respondent's defense at both projects. This formula was repeatedly invoked to counter virtually every allegedly discriminatory anomaly in the hiring process. Thus, the Respondent asserts, it did not consider or hire the discriminatees, however qualified or experienced they may have been, because they never applied at the right time-that is, on each and every occasion that the Respondent filled positions in their crafts, their applications were inactive; or, as the Respondent conversely stated its position, the discriminatees never applied when positions were available. The pretextual nature of this rationale is highlighted by the Respondent's conduct at Exxon. Until the discriminates submitted their applications, Senior Site Manager Austin had ignored the 30-day rule in favor of building up a reserve of qualified applicants. These reserve applicants are the same ones Austin later testified that he would not consider under any circumstance, even if it meant failing to hire adequate staff to meet the Respondent's contractual obligations to its client.

Hiring practices at both projects abounded with one-sided exceptions and disparities. Discriminatees were given different information and different opportunities to apply from applicants who had no discernable union activist leanings[73]

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[72] Where there is no justification for a policy, it may be inferred that the real reason is an unlawful one. *Richard Mellow Electrical Contractors*, 327 NLRB 1112, 1115 (1999) (absence of a business justification, coupled with animus, warranted inference respondent was motivated by a desire to avoid hiring union members).

[73] *See, e.g., Lancer Arch*, 324 NLR3 191, 193 (1997) (respondent treated applicants differently by refusing lo provide applications to those with ostensible union affiliations); and *Clock Electric*, 323 NLRB 1226,

The discriminatees were kept uninformed concerning vital hiring rules and threshold employment requirements,[74] yet were held to the strictest standards of compliance.[75] Although they submitted credentials that would have warranted inquiry—e.g., apprenticeships, other training, positions held, wage rate, years in trade, attached resumes[76]—no discriminatee was interviewed or spoken to beyond perfunctory, and sometimes untruthful, statements.[77] At the same time, applicants with weak or nonexistent union ties were courted, accommodated, and hired, even when they did not meet the Respondent's employment criteria.[78] As in *Fluor Daniel I*

1231 (1997), enfd. in relevant part. 162 F.3d 907 (4th Cir. 1998) (respondent demonstrated animus when it told union activists that it was not hiring at a time when the company was actively seeking to hire other journeymen)

[74] See *M.J. Mechanical Services*, 325 NLRB 1098, 1105 (1998) (employer operating without discriminatory motives is unlikely to conceal from applicants with directly related skills the means of having their applications considered).

[75] See *Monfort of Colorado*, 298 NLRB 73, 79-80 (1990), cnfd. In relevant part, 965 F.2d 1536 (10th Cir. 1992).

[76] *Fluor Daniel I*, 304 NLRB at 970; see also *Fluor Daniel II*, 311 NLRB at 498.

[77] *See Fluor Daniel I*, 304 NLRB at 970, and *Norman King Electric*, 324 NLRB at 1085, for the proposition that the failure to communicate with qualified applicants with union affiliations constitutes evidence of unlawful motive; and fn. 25, supra, regarding the expectation of Respondent managers that recruiters would interview, question, or otherwise communicate with credible applicants.

[78] Rigid enforcement of hiring policies to exclude union applicants, coupled with lax enforcement to include nonunion applicants, has been found to evidence unlawful motive. See *M.J. Mechanical*, 325 NLRB at 1105 (respondent demonstrated on several occasions a willingness to ignore normal hiring procedures when it had a job applicant it desired); and *Monfort of Colorado, Inc.*, supra (at plant reopening, respondent disparately and more strictly adhered to hiring criteria to exclude preclosure unionized work force, while breaching criteria to favor new,

and II, we find that the Respondent offered "no credible reasons" for these clear disparities. We again con-clude that it is "not mere coincidence'' that voluntary union organizers were not hired, while applicants with weak or nonexistent union ties were hired,[79] and that the Respondent's defenses are pretextual.

The Respondent argues that its hire of numerous employees whose applications reflected union affiliation, as well as of discriminatees Russell and Dame, negates any negative inference. We reject that assertion. It is well established that an employer's failure to discriminate against all applicants in a class is not a defense.[80] In addition, the Respondent's definition of union affiliation is so inclusive as to be meaningless. The Respondent counted as "union" those with slight or passive affiliations or whose union connections were in the distant past.[81] Moreover, as the Board observed in *Fluor Daniel II*, there is a significant difference between past union affiliation and notice of present intent to organize.[82] Where applicants who demonstrated such an intent were uniformly excluded from consideration, hiring persons with

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nonunion applicants).

[79] *Fluor Daniel II*, 311 NLRB at 500; *Fluor Daniel I*, 304 NLRB at 970-971. See *Richard Mellow Electrical Contractors*, 327 NLRB at 1115. See generally *U.S. Service Industries*, 324 NLRB 834, 844 (1997) (not "coincidental" that all strikers were transferred to less desirable jobs while nonstrikers were retained in more attractive jobs).

[80] See *KRI Constructors, Inc.*, 290 NLRB at 812; and *Norman King Electric*, 324 NLRB at 1085 (mere seeking out of known union member applicants does not bely animus).

[81] See *KRI Constructors. Inc.*, 290 NLRB at 813 (respondent considered "union" applicants who posed no threat to its open shop operation, such as supervisors, employees of a company that later went nonunion, employees of a company that had closed, etc.).

[82] 311 NLRB at 500; see, in addition, *Clock Electric*, 323 NLRB at 1231.

attenuated union links is inadequate to refute the inference of hostile motive.

The Respondent's exceptions raise another challenge to the sufficiency of the prima facie case. Relying on the decision of the United States Court of Appeals for the Sixth Circuit in *Fluor Daniel II*,[83] the Respondent asserts that the General Counsel has failed to shift the burden of proof to the Respondent by failing to match each alleged discriminatee with an available job that he or she was qualified to perform. The Respondent's reliance on that decision is unavailing. In contrast to *Fluor Daniel II*, in the proceeding before us, the administrative law judge expressly considered job availability and madefactual findings that vacancies existed that the discriminatees were qualified to fill, and, further, that over the life of bath projects there were enough positions to have employed every discriminate.[84] This comports with the test that the Board recently established in FES, supra. We note that the Respondent did not contend that there was insufficient work to employ the discriminatees. Rather, it relies on the defenses that we have found to be pretextual to explain its failure to consider or hire them.

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[83] 161 F.3d 953 (6th Cir. 1998).

[84] Hiring documents and statistics in the record amply support the judge's findings that there were hundreds of jobs that needed to be filled at Palo Verde, and that the Respondent hired 942 craftsmen into these jobs between June 1994 and January 1996. Hiring documents and statistics similarly support his findings that the Respondent hired 2800 employees at Exxon between January and December 1994. Though not all of the 2800 were craft employees, the Respondent never contended that there was not enough work at the project to hire the discriminatees. Rather it relied on its 30.day rule to claim that their applications were never open when the Respondent was hiring in their crams. Cf. *Norris Electric Corp.*, 324 NLFU3 1178, fn. 1 (1997) (General Counsel failed to demonstrate that applications were filed during hiring stages, that the company hired any applicants at h e critical time, or that the company declined to hire in order to avoid hiring the union applicants).

Accordingly, we adopt the judge's decision that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully refusing to consider or to hire the union activists named in the order section of the judge's decision, and otherwise violated Section 8(a)(1) and (3) as the judge found, and we adapt the judge's recommended order as modified.

Finally, although we agree with the judge that the Respondent did not violate Section 8(a)(3) by refusing to hire the five union applicants for the rebar-helper position,[85] we find that the Respondent did unlawfully refuse to consider the five for hire in violation of Section 8(a)(3).

As previously discussed, under *FES*, supra, where the General Counsel alleges a "refusal to consider" violation, he bear5 the burden of establishing at the unfair labor practice hearing that the respondent excluded applicants from its hiring process, and that antiunion animus contributed to its decision not to consider the applicants for hire. Once these elements have been satisfied, the burden shifts to the respondent to demonstrate that it would not have considered the applicants even absent their union activity or affiliation. Were we find that the Genera1 Counsel has met its burden, and that the Respondent has not rebutted it.

Initially, we find that the "failure to consider" allegation properly is before us. The complaint altered that the Respondent unlawfully refused to consider as well as hire the union members who tendered applications for the Respondent's posted-rebar-helper position. The judge resolved the refusal to hire allegation, finding that a violation had not been established. The judge did not separately address the refusal to consider allegation, and the General Counsel and Charging Party Pipefitters have excepted to the failure to find this violation.

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[85] See sec. 3,C, final paragraph of this Decision and Order.

Second, we find that the General Counsel has met its burden under *FES* of establishing that the Respondent unlawfully refused to consider the five union applicants for rebar helper positions. In this regard, we note that the Respondent had posted openings for, and was accepting applications for rebar helpers when the five submitted applications on April 19, 1994.[86] Upon receipt of their applications, the Respondent did not consider them, but promptly pulled its posting for the rebar-helper position. Furthermore, the Respondent's withdrawal of the rebar-helper posting, and refusal to consider the five applicants, occurred in the climate of pervasive antiunion animus and widespread refusals-to-consider and hire other alleged discriminatees. Accordingly, we find that the General Counsel has amply met its burden of establishing a refusal to consider violation as to applicants Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins. We also find that the Respondent has not established that it would not have considered the five applicants for hire even in the absence of their union membership and activity. The fact that the Respondent determined, only after receipt of these applications, to pull the posting and seek to pro- mote current employees into this position, does not satisfy its burden.

AMENDED CONCLUSION OF LAW

Insert the following as a new Conclusion of Law 7 and renumber the subsequent paragraph accordingly:

"7. Respondent violated Section 8(a)(1) and (3) when it failed and refused to consider for hire Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins because of their union affiliation."

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[86] Based on these facts, Member Hurtgen finds that Respondent had a hiring process in effect at the time of hose applications.

ORDER

The National tabor Relations Board orders that the Respondent, Fluor Daniel, Inc., Wintersburg, Arizona, and Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Restraining or coercing employees or applicants for employment in the exercise of their rights by telling them that those applicants who write voluntary union organizer" on their applications will not be hired.

(b) Threatening employees with unspecified reprisals because they engage in protected concerted activity.

(c) Discouraging employees from engaging in activities on behalf of a labor organization by refusing to consider or hire job applicants because they are members or supporters of unions, or because they indicate on their employment applications that they are voluntary union organizers.

(d) In any other manner interfering with, restraining, or coercing employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the dare of this Order, offer to the below listed individuals employment in the positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights and privileges.

Palo Verde Project
(Applicants who filed their applications in June 1994)

Boilermakers
John Allen
Chester Arthur
James Begay
Gary Clark
William Deen
Francisco Diaz
Jerry Dillon
Leslie Dixon
Gary Evenson
Wayne Fern
Michael Harvey
Robert Logue
Dan Mourney
Rudy Parjga
Vern Price
William Quallis
Ira Sexton
Gary Sly
Curtis Veich
Larry Voarhees
Ernie Wilden

Electricians
John Starkel

Insulators
Michael Bradley
Ed Martinez
Frank Naccarato

Millwrights
Peter Apostoles
Melvin Boyd
Lee Braudt
Gary Brinlee
Albert Charter
Frank Cody
John Cooper
Joe Hammons
Peter Kornmuller
Lloyd Landers
Jack Martyn
Michael McQuarrie
William Miles
Wylie Miller
William Oviedo
John Spiller
Roger Stone
Michael- Swarthout
Frank Troester
Michael Valdez
Richardo Valdez

Ironworkers
Tony Allen, Sr.
Mel Brubaker
Jim Lehmann
Lance Mendel
Martin Murphy
Floyd Smith

Palo Verde Project
(Applicants denied opportunity to file applications on June 27, 1994)

Insulators
James Arias
Abondio Cabrera
Robert Cabrera
Curtis Case
James Cruill
William Howlier
Mark Kasdorf
Dennis Moya
Kelvin Patton
Jose Sanchez

Painters
Julio Garcia
Greg Stroud

Boilermakers
Michael Goodman
Mike Leslie
Joseph Wood

Carpenters
Francis Chancy
Don Shoemaker
Johnny Tyler Jr.

Sprinkler Fitter
John Rahn

Ironworkers
Linda Hayes
Steve Padilla
Ron Richards

Cement Masons
Waymond Parker
Charles Walsh

Millwrights
Clyde Hafeli
Ken Hayes

Palo Verde

(Applicant first told in August 1995 that Respondent needs welder and then told, after he says he is union and wants to organize, that Respondent does not need welders at that time)

Boilermaker
Mark Winham

Exxon Project

Electricians
Danny Aucoin
Ricky Achord
Joe Aycock
Chirs Bonnette

Pipefitters
Jeff Armstrong
William Blalock
Eugene Braud
Billy D. Breaud

Kelly Browning
Jeff Bourg
Curtis Blount
Edwin Cooks
Mike Clary
Richard Fletcher
Keyy Gauthreaux
Wallace Roland Goetzman
Dan Guarino
Mike James
Earl Long
Robert LeJeune
Leon Parent
Ronnie Penny
Earnest Perrault
Steve Pritchard
Dale Rispone
Kendrick "Ricky" Russell
Jeffrey Burns
Ernest Ford
Jeff Mire
Steven LeBlanc
Terry Quatrevingt
Mike Wooten

Boilermakers
James "Kenny" Bueche
David Greer
Ed Hughes
John Kelly
J. J. Leveron
C. A. Lewis
Robert H. Redden
A. E. Ross

(b) Make the individuals listed in paragraph 2(a) above whole for any loss of pay and other benefits suffered by them as a result of the discrimination against them and make Charles Dame whole for any loss of pay and other benefits suffered by him as a result of Respondent's refusal to release his security badge to Exxon, backpay to be computed in compliance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Permit the individuals listed in paragraph 2(a) above to be tested to be certified by the Respondent in the craft for which they were unlawfully denied employment.

(d) Consider Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant and Jerry Elkins for future job openings in the rebar-hewer position, in accord with non-discriminatory criteria, and notify the Charging Party, United

Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Pipefitters Local Union No. 198, and the Regional Director for Region 15 of future openings in positions for which the discriminates applied or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that Respondent, but for the failure to consider Strothers, Fee, Johnson, Durant, and Elkins on April 19, 1994, would have selected any of them for any job openings arising after the beginning of the hearing on August 1, 1995, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, Respondent shall hire them for any such position and make them whole for any loses, in the manner set forth in the remedy section of the judge's decision, as modified.

(e) Within 14 days from the date of this Order, notify Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins in writing that any future job application will be considered in a nondiscriminatory way.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider or hire, and within 3 days thereafter notify the individuals listed in paragraphs 2(a) and 2(d) that this has been done and that the refusals to consider, and the refusal to consider and hire, will not be used against them in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(h) Within 14 days after service by the Regions, post at all of its employment facilities and jobsites subject to the

jurisdiction of the National Labor Relations Act copies of the attached notice marked "Appendix."[87] Copies of the notice, on forms provided by the Regional Directors for Region 15 and 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and applicants are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at anytime since March 3 1, 1994.

(i) Within 21 days after service by Regions 15 and 28, file with the Regional Directors a sworn certification of a responsible official on a form provided by the Regions attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated later the National Labor Relations Act and has ordered us to post and abide by this notice.

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[87] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United Stales Court of Appeals Enforcing m Order of the National Labor Relations Board."

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WLL NOT coerce employees or applicants for employment in the exercise of their rights by telling them that those applicants who write "voluntary union organizer" on their applications will not be hired.

WE WILL NOT threaten employees with unspecified reprisals because they engage in protected concerted activity.

WE WILL NOT discourage employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants because they are members of or supporters of unions, or because they indicate on their employment applications that they are voluntary union organizers.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights protected by the Act.

WE WILL offer to the below listed individuals employment in positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

Palo Verde Project

Boilermakers

John Allen
Chester Arthur
James Begay
Gary Clark
William Deen
Francisco Diaz
Jerry Dillon
Leslie Dixon
Gary Evenson
Wayne Fern
Michael Harvey
Robert Logue
Dan Mourney
Rudy Pariga
Vern Price
William Quallis
Ira Sexton
Gary Sly
Curtis Veich
Larry Voorhees
Ernie Wilden

Electrician

John Starkel

Insulators

Michael Bradley
Ed Martinez
Frank Naccarato

Millwrights

Peter Apostoles
Melvin Boyd
Lee Braudt
Gary Brinlee
Albert Charter
Frank Cody
John Cooper
Joe Hammons
Peter Kornmuller
Lloyd Landers
Jack Martyn
Michael McQuarrie
William Miles
Wylie Miller
William Oviedo
John Spiller
Roger Stone
Michael Swarthout
Frank Troester
Michael Valdez
Richado Valdez

Ironworkers

Tony Allen Sr.
Mel Brubaker
Jim Lehmann
Lance Mendel
Martin Murphy
Floyd Smith

Palo Verde Project

Insulators

James Arias
Abondio Cabrera
Robert Cabrera
Curtis Case
James Cruill
William Howlier
Mark Kasdorf
Dennis Moya
Kelvin Patton
Jose Sanchez

Painters

Julio Garcia
Greg Stroud

Boilermakers

Michael Goodman
Mike Leslie
Joseph Wood

Carpenters

Francis Chancy
Don Shoemaker
Johnny Tyler Jr.

Sprinkler Fitter

John Rahn

Ironworkers

Linda Hayes
Steve Padilla
Ron Richards

Cement Masons

Waymond Parker
Charles Walsh

Millwrights

Clyde Hafeli
Ken Hayes

Palo Verde

Boilermaker

Mark Winham

Exxon Project

Electricians

Danny Aucoin
Ricky Achord
Joe Aycock
Chris Bonnette
Kelly Browning
Jeff Bourg
Curtis Blount

Pipefitters

Jeff Armstrong
William Blalock
Eugene Braud
Billy D. Breaud
Jeffrey Bums
Ernest Ford
Jeff Mire

Edwin Cooks
Mike Clary
Richard Fletcher
Kelly Gauthreaux
Wallace Roland Goetzman
Steven LeBlanc
Terry Quatrevingt
Mike Wooten

Boilermakers

Dan Guarino
Mike James
Earl Long
Robert LeJeunc
Leon Parent
Ronnie Penny
Ernest Perrault
Steve Pritchard
Dale Rispone
Kendrick "Ricky" Russell
James "Kenny" Bueche
David Greer
Ed Hughes
John Kelly
J. J. Leveron
C. A. Lewis
Robert H. Redden
A. E. Ross

WE WILL make the above listed applicants whole for any loss of pay and other benefits, with interest, and make whole Charles Dame for loss of pay and other benefits as a result of our unlawful refusal to release his security badge, with interest.

WE WILL permit the above listed individuals to be tested to be certified in the craft for which they were unlawfully denied employment.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider and hire the above-named discriminatees and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to consider and hire them for employment will not be used against them in any way.

WE WILL consider Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins for future job openings in accord with nondiscriminatory criteria, and

notify them, the Charging Party United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Pipefitters Local Union No. 198, and the Regional Director for Region 15 of future openings in positions for which the discriminatees applied or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for the failure to consider them, they would have been selected for any other openings, we shall hire them for any such position and make them whole, with interest, for any loss of interest and benefits.

WE WILL, within 14 days of the Board's Order, notify Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins in writing that any future job application will be considered in a nondiscriminatory way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider for employment Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.

FLUOR DANIEL, INC.

Jerome Schmidt, Esq., and *Jeffrey DeNio, Esq.*, for the General Counsel.

William S. Myers, *Mark Keenan*, and *Lewis T. Smoak*, *Esqs. (Ogletree, Deakins, Nash, Smoak, & Stewart)*, of Atlanta, Georgia, for Respondent.

Michael J. Stapp and Charles R. Schwartz, Esqs. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Charging Party Boilermakers.

Francis J. Martorana and Benjamin N. Davis, Esqs. (O'Donoghue & O'Donoghee), of Washington, D.C., for the Charging Party Pipefitters Local 198.

Kendrick Russell, Business Manager, of Baton Rouge, Louisiana, for the Charging Party IBEW Local 995.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. This consolidated case involves allegations of unfair labor practices against Fluor Daniel, Inc. (Respondent). Respondent is one of the largest, if not the largest, general contractors in the world. This case involves allegations of failure and refusals to hire over 100 union affiliated applicants for employment because of their union affiliation at two separate and distinct projects, i.e., the Palo Verde Nuclear Generating Station in Wintersburg, Arizona, where Respondent had a service and maintenance contract, and Exxon's refinery in Baton Rouge, Louisiana, where Respondent was rebuilding Exxon's East Coker plant after it was destroyed by fire.

The case began with the filing of charges against Respondent by the Boilermakers International Union, IBEW Local 995, and Pipefitters Local 198. The Boilermakers International Union filed its charged two amended charges in Region 28 in Phoenix, Arizona.[1] IBEW Local 995 and Pipefitters Local 198 filed charges and amended charges in Region 15 in New Or-leans, Louisiana.[2]

On April 17, 1995, the National Labor Relations Board, by the Regional Director for Region 28, issued an amended complaint and on March 29, 1995, the National Labor Relations Board, by the Regional Director for Region 15, issued an amended complaint. Both amended complaints allege that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

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[1] Case 28-CA-12750.

[2] Cases 15-CA-12938, 15-CA-12723, 15-CA-12852, 15-CA-12936, 15-CA-12544, and 15-CA-12666.

On April 12, 1995, the General Counsel in Washington, D.C., had ordered that the complaints issued against Respondent in Region 28 and Region 15 be consolidated for trial.

Respondent had previously filed answers to the two amended complaints in which it denied that it violated the Act in any way.

Fifty one days of hearings were held before me between August 1, 1995, and December 12, 1996. The hearings were held in Phoenix, Arizona, and Baton Rouge, Louisiana. Shortly after the hearing opened in Phoenix in August 1995, the Boilermakers International Union filed an additional charge with Region 28 in Phoenix, Arizona, which the charge led the Regional. Director for Region 28 to issue a complaint which I ordered consolidated for trial with the two amended, complaints previously consolidated by the General Counsel.[3]

The consolidated complaints will be referred to simply as the complaint. There are two other reported cases involving Respondent, i.e., *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), enfd. mem., 976 F.2d 744 (11th Cir. 1992), and *Fluor Daniel, Inc.*, 311 NLRB 498 (1993), enfd. in part and remanded in part 102 F.3d 818 (6th Cir. 1996). These two reported cases were referred to in this litigation as *Fluor Daniel I* and *Fluor Daniel II*, respectively. I was the administrative law judge who presided in *Fluor Daniel II*.

Upon the entire record in this case, to include posthearing briefs submitted on August 14, 1997, by the General Counsel, Respondent, Charging Party Boilermakers, and Charging Party Pipefitters Local 198 and, upon my observation of the witnesses and their demeanor, I hereby make the following.

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[3] Case 28-CA-13357.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it meets the Board's jurisdictional standards at its jobsites at the Palo Verde Nuclear Generating Station in Arizona and at Exxon's East Coker plant in Louisiana.

Respondent further admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that the Boilermakers International Union, IBEW Local 995, and Pipefitters Local 198 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Fluor Corporation, which is listed on the New York Stock Exchange, is the holding company for three subsidiary companies. The three companies are Fluor Daniel, Inc. (Respondent), Fluor Constructors International, Inc., Fluor Constructors, and AT Masey. Respondent is an open shop constructor, i.e., its employees are not organized and Respondent operates without a union contract.

Fluor Constructors is the union side of Fluor Corporation's empire. It is relatively small compared to Fluor Corporation's nonunion or open shop side, i.e., the Respondent.

Fluor Corporation, the parent, started up in the early 1900's in. southern California. It was engineering oriented and its construction work was done by Fluor Constructors, Inc., which became quite unionized and is now the union side of

Fluor Corporation and is now known, not as Fluor Constructors, Inc., but as Fluor Constructors International, Inc.

Daniel Construction was a nonunion or open shop general construction contractor and Fluor Corporation purchased it in the late 1970's and created Fluor Daniel, Inc., Respondent herein, some years later.

Traditionally Respondent, like most construction contractors, would go from job to job, i.e., it finishes one job and moves on to the next one and hires, quite often, craftsmen who had worked for it on prior projects. The supervisors and superintendents on various projects over the years had followings, that is, craftsmen who worked for them in the past and these people were often hired on new projects.

As time passed and Respondent got bigger and bigger it decided to establish a craft certification program. In time the certification program evolved into a written test, or in the case of welders a hands on demonstration of ability, and an evaluation of job performance after a period of time, usually 30 days. If the employee received a high enough score on the written test or demonstration, if a welder, and a high enough rating on his or her performance rating that person would become certified in a particular craft. It was also possible for a person to be certified in more than one craft.

In this case, we are dealing with allegations that Respondent unlawfully failed to consider for hire and unlawfully failed to hire applicants for employment because the applicants for employment were affiliated with a union.

Respondent can chose a number of different ways to staff a job or project, e.g., what it refers to as "construction management" where Respondent serves as a general contractor and subcontracts the work to subcontractors who may or may not be open shop. The labor posture chosen by Respondent for the two projects involved in this litigation was "self perform open shop," i.e., Respondent would hire the employees to

staff the project and would remain unaffiliated with any union.

Respondent had a hiring priority which it applied nationwide (if not worldwide) and which it applied on the two projects involved in this litigation.

That hiring priority was as follows: Respondent would initially hire Fluor Daniel certified applicants, then applicants with Fluor Daniel experience, and lastly all others. This was the hiring priority at Palo Verde but it was slightly modified at the Exxon project where Respondent claimed it gave priority to Louisiana residents within each of the hiring priorities.

The rationale far this hiring priority is, of course, the not unreasonable desire of an employer to hire as its employees people who have worked for it in the past and proven themselves to be competent and reliable workers. On its face, such a hiring priority is not unlawful because it is discrimination on the basis of competence and reliability and not discrimination based on race, gender, religion, or union affiliation. In practice it may put long time union members at a disadvantage because there is probably a good chance that they worked for union contractors in the past and not for nonunion contractors such as Respondent and would, as a result, not be either Fluor Daniel certified or Fluor Daniel experienced. A person could not become certified unless first hired as an employee so if a person was never hired by Respondent they would never ~~become~~ Fluor Daniel certified.

Fluor Corporation is the holding company for both Fluor Daniel, Inc., Respondent, and Fluor Constructors, Fluor Corporation's union arm. Even though both Respondent and Fluor Constructors are under the umbrella of Fluor Corporation experience as an employee of Fluor Constructors, which is union, does not result in a job applicant for a job with Respondent getting any type of hiring preference whatsoever.

I do not find on the basis of the record before me that Respondent's hiring practice per se is violative of the Act.

However, the record as a whole developed over 51 days of hearings, the testimony of over 100 witnesses, and thousands of pages of exhibits clearly establishes that Respondent at both jobsites in this litigation discriminated unlawfully against applicants for employment because of their union affiliation.

I will address each of the two jobsites separately.

At the outset, I note that an employer violates Section 8(a)(1) and (3) of the Act when it discriminates against an employee with regard to his or her tenure of employment to discourage union support or otherwise interfere with protected concerted activity. The Supreme Court has held that the Act protects applicants for employment as well as employees. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183 (1941). Accordingly, the refusal to consider an application for employment for reasons prohibited by the Act is a violation of Section 8(a)(3) of the Act. *Starcon, Inc.*, 323 NLRB 977 (1997); *D.S.E. Concrete Forms*, 303 NLRB 890, 896 fn. 3 (1991), enfd. 21 F.3d 1109 (5th Cir. 1994); and *Shawnee Industries*, 140 NLRB 1451, 1453 (1963).

In reaching the conclusions I reach, I have considered and applied the Board's landmark decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir: 1981) cert. denied, 455 U.S. 989 (1982), but have also been mindful of the Sixth Circuit decision in *Fluor Daniel II*, supra.

This case may be referred to as a "salting" case. "Salting" is the word used to describe a situation where union affiliated applicants for employment seek jobs with nonunion employers in order to organize the job or employer from within.

The. Exxon project in Baton Rouge is a classic "salting" case but the situation at the Palo Verde Nuclear Generating

Station in Arizona is a "salting" case with a wrinkle because with one exception (paid union organizer Gary Evenson) all the applicants for jobs at Palo Verde had worked at Palo Verde in the same jobs they were applying for with Respondent. They had worked for Bechtel Corporation which had the service and maintenance contract at Palo Verde before Respondent got it in June 1994.

The organizing effort of the Boilermakers is called their "Fight Back" program and the organizing effort of the electricians is called COMET. COMET, an acronym, stands for construction, organizing, membership, education, and training.

"Fight Back" and "Comet" both seek to organize nonunion contractors in order to secure better wages and benefits for union members on the theory that nonunion contractors will not be able to underbid Union contractors because they pay less in wages and benefits if all contractors are organized and paying good wages and furnishing good benefits to their employees.

B. Palo Verde Nuclear Generating Station (Palo Verde), Wintersburg, Arizona

For many years Bechtel Corporation, which is a heavily unionized employer and one of the largest general contractors and engineering firms in the world, had a service and maintenance contract with Arizona Public Service covering the Palo Verde Nuclear Generating Station in Wintersburg, Arizona, which is some: 55 miles or so or a 1-hour car ride from Phoenix.

In connection with its obligations under the contract Bechtel Corporation provided a core group of craftsmen who worked full time at Palo Verde and also provided large numbers of craftsmen for periodic power outages at Palo Verde where extensive service an maintenance work would be done.

In 1994, Arizona Public Service put out bids with respect to the renewal of the contract to provide the service and Sainte work provided up to then by Bechtel Corporation. Respondent underbid Bechtel Corporation and got the service and contract It was a 3-year contract with work to commence in the summer of 1994. Between June 1994 and February 1996. Respondent had hired 962 people out of the 1281 who had applied to do the work required under the contract.

During the time that Bechtel had the contract, craftsmen from the following unions worked for Bechtel at Palo Verde, i.e., Boilermakers Local 627, Millwright Local 1914, Electricians Local 640, Ironworkers Local 75, Asbestos and Insulators Local 73, Cement Masons Local 394, and Carpenters Local 408.

Ron Green, president of power for Respondent and the highest ranking corporate official to appear as a witness, testified that Respondent bid the job with' Arizona Public Service believing it could do periodic power outages quicker than Bechtel and with less people but testified further that Respondent was not in any way critical of the work performed by the craftsmen who worked for Bechtel and, indeed, it was Respondent's desire formally expressed to Arizona Public Service to identify and hire those former employees of Bechtel who were outstanding workers.

It is with this backdrop that in June 1994, 52 union affiliated applicants for employment applied for work with Respondent but are not hired and an additional 26 union affiliated applicants for employment are not even given the opportunity to apply for employment.

The people who applied and those who tried to apply on June 27, 1994, but were not allowed to, all possessed skills that were needed by Respondent and applied for jobs which Respondent later hired literally hundreds of other applicants. With the sole exception of Boilermakers paid union organizer

Gary Evenson, all of these 78 applicants had worked for Bechtel at Palo Verde and had previously secured the high security clearances necessary to work at a nuclear power plant and had taken numerous courses and received extensive training from Arizona Public Service which was necessary in order to competently perform - the important and sometimes highly dangerous work needed at a nuclear facility.

As noted earlier from the time Respondent took over the service and maintenance contract from Bechtel in June 1994 until February 1996, Respondent hired 962 out of the 1281 applicants for employment at Palo Verde and, indeed, hired fully 300 people in January 1995 for the first major power outage.

In early June 1994, representatives of the construction trade unions met in Phoenix and decided to undertake the task of having union affiliated applicants for employment apply to work for Respondent at Palo Verde. Essentially the representatives of various unions would call their members who were former Bechtel workers and had actually worked at Palo Verde and inquire if they wanted to apply for work. The union official in charge of this effort was Gary Evenson, a highly qualified boilermaker and full-time paid union organizer for the Boilermakers International Union.

On several days in June 1994, groups of craftsmen would meet at the Boilermakers union hall in Phoenix where Evenson would ask if they wanted to apply for work with Respondent at Palo Verde and would indeed accept employment if offered. They were instructed to write "voluntary union organizer," or words to that effect, on their applications and not to bother applying for work unless they were interested in taking the job, doing a good job for Respondent, and willing to try to organize Respondent.

I find that the applicants were bona fide applicants for employment. *See*, e.g., *Town & Country Electr.*, 516 U.S. 85

(1995). 1 note that they were applying for work at a site where they had worked before and they lived in the general area of Palo Verde, namely, Phoenix and its suburbs.

On each of several days in June 1994, a group would then leave Phoenix after receiving, Evenson s orientation and meet up again at a grocery store called the Red Quail near the Palo Verde site and then proceed as & group to respondent's trailer where they would apply or try to apply for work.

On June 16, 1994, .the first group of 19 men went to Respondent's trailer. Rather than all go in at once Gary Evenson and Mark Smith entered first and were given applications to fill out. Interestingly enough Mark .Smith, a boilermaker, had been told on June 14, 1994, to come back the next day to apply. He did and was told by a representative of Respondent, Leonard Wallace, that Respondent was going to need welders and soon. Boilermakers do welding work. Smith had given no indication that he was union affiliated on June 14 and 15, 1994. Evenson and Smith, likewise, were not manifesting in any way that they were union affiliated on June 16, 1994. They filled out their applications and a short while later the rest of the group entered. All were wearing union buttons and hats and Evenson and Smith then displayed union buttons and hats. The rest of the group were allowed to fill out applications. It is clear Respondent knew the applicants were union-affiliated.

They were as follows:

Boilermakers

Chester Arthur
William Deen
Francisco Diaz
Jerry Dillon
Wayne Fern
Michael Harvey
Robert Logue
Don Moumey
Vern Price
William Quallis
Curtis Veich
Larry Voorhees
Ernie Wilden
Leslie Dixon
Ira Sexton
Gary Evenson

Ironworkers

Jim Lehmann
Martin Murphy

Insulator

Frank Naccarato

All filled out applications. None were hired. All except Gary Evenson, he had worked for Bechtel at Palo Verde and had secured high security clearances and received extensive training given by Arizona Public Service. Evenson, a highly experienced boilermaker with 35,000 hours of experience, had not previously been employed by Respondent. Each application on its face said it was good for 60 days.

On June.20, 1994, a second group of union affiliated applicants consisting of 15 men went to Respondent's trailer and filled out applications. They were as follows:

Millwrights

Peter Apostoles
Melvin Boyd
Frank Cody
John Cooper
Joe Harnmons
Peter Kornmuller
Lloyd Landers
Michael McQuarrie
Wylie Miller
Roger Stone
Frank Troester
Michael Valdez

Ironworker

Lance Mendel

Boilermakers

Gary Clark
Rudy Pariga

All of the men who applied on June 20, 1994, had worked for Bechtel at Palo Verde, had security clearances, and had received extensive training from Arizona Public Service. None were hired.

On June 21, 1994, two union affiliated men applied at Respondent's trailer for work. They were as follows:

Boilermakers

John Allen
Gary Sly

Again these applicants had worked for Bechtel at Palo Verde, had high security clearances, and had received extensive training from Arizona Public Service. They were never offered employment.

On June 23, 1994, a group of 16 union affiliated men applied at Respondent's trailer for work. They were as follows:

Millwrights

Lee Braudt
Gary Brinlee
Albert Charter
Jack Martyn
William Miles, Jr.
William Oviedo
John Spiller
Michael Swartbout
Richard Valdez

Electrician
John Starke)

Ironworkers

Tony Allen, Sr.
Mel Brubaker
Floyd Smith

Boilermaker
James Begay

Insulators
Michael Bradley
Ed Martinez

Again all these applicants had worked for Bechtel at Palo Verde, had high security clearances, and had received extensive training from Arizona Public Service. They were never offered employment.

The applications of all of the above 52 union affiliated applicants had a statement on the application which stated the application form would expire in 60 days after they were submitted or for these applicants in mid to late August 1994.

The applications submitted by the above 52 applicants for employment for the most part indicated on the face of the applications that the applicants were "Voluntary Union Organizers" and, in any event, it was crystal clear to Respondent's representatives who accepted the applicants that these applicants were union affiliated. Respondent does not contend that it did not know that these applicants were affiliated with a union. Again, none were offered employment.

Most of the above 52 discriminatees testified and for the few who did not we have their applications in evidence. All those who testified were exceedingly truthful and all 52, without exception, were qualified to work at Palo Verde. Literally hundreds of people were later hired by Respondent to do work these union affiliated applicants wanted to do and were exceedingly well qualified to do. And even with Respondent's hiring preference fully 45 percent of the craftsmen hired at Palo Verde had no prior experience with Respondent.

On June 27, 1994, a group of approximately 26 union affiliated applicants arrived at Respondent's trailer to apply for work. They were as follows:

Insulators
James Arias
Abondio Cabrera
Robert Cabrera
Curtis Case
James Cruill
William Howlier
Mark Kasdorf
Dennis Moya
Kelvin Patton
Jose Sanchez

Boilermakers
Michael Goodman
Mike Leslie
Joseph Wood

Ironworkers
Linda Hayes
Steve Padilla
Ron Richards

Millwrights
Clyde Hafeli
Ken Hayes

Cement Masons
Waymond Parker
Charles Walsh

Sprinkler Fitter
John Rahn

Carpenters	*Painters*
Francis Chancy	Julio Garcia
Don Shoemaker	Greg Stroud
Johnny Tyler Jr.	

June 27, 1994, was a Monday and the group of applicants, who had. all worked for Bechtel at Palo Verde and had security clearances and extensive training were told by Dean Hamrick, a supervisor for Respondent, that Respondent was not accepting applications. They left.

A charge was filed over the failure and refusal of Respondent to consider these applicants for employment and Respondent responded to the charge with a position letter which inaccurately stated that Respondent had accepted no applications between June 24 and June 28, 1994.

With respect to what occurred on June 27, 1994, Respondent clearly violated Section 8(a)(1) and (3) of the Act by refusing to consider for employment the union affiliated applicants. Hamrick admits that he knew that the persons who sought to apply for jobs on June 27, 1994, and were led by Gary Evenson were union people. Respondent never told anyone in the group to come back the next day and apply and most significantly Respondent was accepting applications on June 27, 1994. Indeed, no less than 55 people submitted applications on June 27, 1994, and were hired and Respondent accepted five more applications on June 28, 1994, and hired the applicants and eight applications on June 29, 1994, and hired the applicants. Most .of these applicants who were hired were former employees of Respondent but not all of them.

Going to Respondent's trailer was not like going next door or across town to file an application where it would be fairly easy to come back the next day. Respondent's trailer, where it accepted applications; was out in the desert some 55 miles from Phoenix.

With respect to boilermaker Joseph Wood, I note that a week or so earlier he had asked his mother, who worked for Arizona Public Service at Palo Verde, to get him an application to apply for work for Respondent. She did. He filled it out and gave it to his mother to turn in. Wood's mother, Catherine Ray, who testified before me, handed in the application at Respondent's trailer to a young woman prior to June 27, 1994. On the application Wood had written that he was a "voluntary union organizer." Not only was Wood never called but Respondent claims it did not even have his application as having been received.

All 26 of the people who tried to apply for work with Respondent on June 27, 1994, had worked for Bechtel at Palo Verde and had skills actually needed by Respondent at Palo Verde and other people were hired in their place to do what they were qualified to do and what they had actually done at that very site while working for Bechtel.

Most of the 26 would be applicants testified and impressed me as highly credible and competent craftsmen.

On July 28, 1995, a little more than a year after Respondent began its operations under the service and maintenance contract at Palo Verde union boilermaker Mark Winham, who had worked for Bechtel at Palo Verde, called Respondent's office to seek employment. He asked to speak to Mike Owen, who Gary Evenson had told him was doing the hiring. A woman who answered Respondent's phone said Mike Owen was busy at the moment but told Winham that Respondent was looking for welders, which is the type of work performed by boilermakers. Owen was a craft recruiter at the time for Respondent.

Later that very day Mark Winham spoke on the phone with Mike Owen and after. Winham told Owen that he was a union boilermaker; had worked at Palo Verde before, and wanted to hire on and organize a little bit for the union, Owen tells Win-

ham that Respondent really did not need anyone right then but that Winham should give Owen his name and he will call him when they need welders. Needless to say Owen never called Winham.

Curiously enough Danny Garnica had spoken with Mike Owen just the day before and Owen told boilermaker Garnica, who did not identify himself as union affiliated, to come out and fill out an application for a welder position. Owen admits he did not know Garnica was with the Union.

In other words, Owen, not knowing Garnica is union affiliated, says to him over the phone to come out and fill out an application for a welder position but tells Winham, who tells Owen he is union affiliated, that Respondent doesn't need welders right then and not to come out and apply even though a' woman in Respondent's office earlier that very day had told Winham that Respondent needed welders. Both Gamica and Winham are welders. Welders are thereafter hired. Respondent violated Section 8(a)(1) and (3) of the Act when it failed to consider for hire and failed to hire Mark Winham.

The charge in the Winham matter was filed on October 4, 1995, and a complaint in that case, Case 28-CA-13357, issued on November 29, 1995, and was, as noted above, consolidated with the instant case.

The trial of the instant case began on August 1, 1995, and Respondent was well aware that the June 1994 applicants for employment were alleging that they had been discriminatorily denied employment and yet Respondent never contacted them about job openings.

I find that the people who applied for work with Respondent on June 16, 20, 21, 23, and the people who tried to apply for work with Respondent on June 27, 1994, but were not allowed to were all good-faith applicants for employment. With the exception of Gary Evenson, the Boilermaker's paid union organizer, all had formerly worked for Respondent's

predecessor, Bechtel Corporation, at Palo Verde. There is nothing to suggest that they were anything but good-faith applicants for employment and are therefore entitled to the protection of the Act.

The next inquiry must be whether there were jobs that were to be filled. In other words it cannot be a violation of the law to fail to hire someone if in fact there was no opening to be filled.

In this case there were hundreds of jobs that were needed to be filled and were later filled by Respondent for which these union affiliated applicants were qualified.

At least as of the time the hearing before me closed on December 12, 1996, Respondent was hiring for periodic power outages which required work to be done which is the same work the union affitiated applicants did for Bechtel and which has to be done by Respondent. From the time Respondent began hiring craftsmen at Palo Verde in June 1994 until February 1996, Respondent had hired 962 craftsmen. There were more that enough jobs for all the discriminatees to be hired into their craft.

From June 16, 1994, until the present, Respondent has known these applicants wanted jobs: They knew it from the applications filed in June 1994 and they they knew it because of charges and amended charges being filed on September 19 and October 27, 1994, and January 12, 1995, and they knew because of the amended complaint which issued on April 17, 1995, and they knew it from the hearing before me which began on August 1, 1995, and yet no offers of jobs have been made to these union affiliated applicants for employment. Respondent claims that it has a policy that applications remain active for 60 days but, according to Respondent, the 60-day active-period rule is because after 60 days most craftsmen have found work and are no longer interested in working for Respondent but in this litigation we know the applicants were

still interested in working for Respondent and Respondent knew it as well.

There is also no question about the fact that Respondent knew these applicants were union affiliated.

I find that these union affiliated applicants for employment were denied hire because of their union affiliation.

The record contains massive amounts of evidence which demonstrate antiunion animus on Respondent's part. The evidence of animus which supports the conclusion that Respondent discriminated in hiring against these union affiliated applicants for employment is as follows.

1. Prior to beginning work at Palo Verde, Respondent, in May 1993 conducted a wage survey. Respondent determined to staff the job on a "direct hire open shop" basis, i.e., Respondent would directly hire applicants for employment but it noted in the wage survey what it referred to as a "risk." The greatest risk Respondent warned of was that they may pick up union craft workers primarily in the mechanical trades. (*See* C.P. Exh. 93.) Respondent concedes in its brief at p. 160 that "this risk was noted because it posed a potential threat to Respondent's preferred means of performing the project open-shop, as union members could conceivably seek union representation and ultimately, a collective bargaining agreement." This coupled with all the other evidence establishes by at least a preponderance of the evidence that Respondent discriminated in hiring against the union affiliated applicants for employment in this case. Respondent's argument that this did not impact on actual hiring decisions is ludicrous.

2. There is no hiring preference for salaried personnel (engineers, etc.) who have worked in the past for Respondent but there is a hiring preference for craftsmen. The rationale for a preference should be that these folks worked far us in the past and were good workers so lets hire them over some-

one who never worked for us. This rationale should apply to salaried engineers as well as craftsmen but since engineers are not unionized and craftsmen may be it raises a question about Respondent's motive for having a hiring preference.

3. Fluor Corporation is the parent corporation for Respondent (Fluor Daniel, Inc.) and its union counterpart (Fluor Constructors) and yet while there is a hiring preference if someone has experience with Respondent (Fluor Daniel, Inc.) there is no hiring preference if the person worked for Fluor Corporation's union counterpart. The inference seems clear, i.e., Respondent doesn't want to hire union craftsmen.

4. On June 14, 1994, union boilermaker Mark Smith, went to Respondent's trailer at Palo Verde where people applied for work and said he wanted to apply. He was told by a representative of Respondent to come back the next day. Smith returned the next day and submitted an application. The representative of Respondent was craft recruiter Leonard Wallace who told Smith that Respondent would need welders soon. Wallace did not testify. However, Dean Hamrick, also a craft recruiter for Respondent, testified in Respondent's case that he told Gary Evenson, when Evenson and other union boilermakers went to apply on June 16, 1994, that Respondent was not hiring any boilermakers. Evenson and boilermaker applicants Leslie Dixon, Ernest Wilden, Michael Harvey, and Chester Arthur all credibly testified in rebuttal that no one representing Respondent said Respondent was not hiring boilermakers.

5. At the time that union insulator Frank Naccarato applied for work with Respondent on June 16, 1994, Respondent needed insulators. A notation was prepared by craft recruiter Dean Hamrick dated June 22, 1994, in his diary which was to remind him to ask recruiter Jim Hanna whether Naccarato should be hired because he was "non-Fluor Daniel." Written in the diary was the word "no." Hamrick testified that he answered his own inquiry and did not speak

to Hanna about Naccarato and was really inquiring about whether there was a requirement to hire applicants who identified themselves as voluntary union organizers. This is utter nonsense. Hamrick had been in human resources work for Respondent since 1982. Hamrick knew full well there was no legal obligation to hire voluntary union organizers. It appears to me that Hamrick was tempted to hire Naccarato but wanted to check if it was okay because Naccarato was union and Hamrick found out that he should not hire him because of Naccarato's union affiliation.

6. On August 16, 1994, union boilermaker Steve l iorlachei called out to Respondent and was told Respondent was looking for welders. This means that Respondent was ignoring the applications it had on file from the union applicants which were *submitted in mid-June 1994. Horlacher was hired. He did* not note on his application that he was a voluntary union organizer and he was hired whereas those union applicants who had made known their intent to exercise their federally guaranteed right to organize were not hired.

7. Steve Horlacher filed two applications with Respondent On June 16, 1994, there was indicia of union affiliation on his application. He was *not* hired. On August 16, 1994, there was *no* indicia of union affiliation on his application. and he was hired.

8. Millard "JD" Howell is a boilermaker union organizer. He is not an alleged discriminatee in this case. On July 14, 1994, Howell called Respondent's office at Palo Verde and spoke with. a women he" thought identified herself as Sue. He asked if Respondent .was looking for welders. She told Howell to give her his time and telephone number and she would get back to him. Howell had told her he had worked for several different companies all of which were nonunion. Howell left his mother's telephone number in Mis-

sissippi with the woman in Respondent's office at Palo Verde.

On September 12, 1994, Howell's wife told him that a woman named Marilyn had called Howell's mother and left a telephone number for him to call.

Howell called. Marilyn on the telephone number given him. Marilyn, it turned out, worked for Respondent at the Wolf Creek Nuclear Station in Kansas.

Marilyn told Howell that Respondent was looking for welders arid' hands at Wolf Creek and Howell told her that he and another person would show up for work at Wolf Creek.

Howell went to Wolf Creek with another union boilermaker names James "Jay" Bragan. Both men were hired. On their applications at Wolf Creek Howell wrote that he was a "voluntary union organizer" and. Bragan wrote that he was a "paid union organizer?" Bragan testified and corroborated Howell.

The need for welders at Wolf Creek was so great that a memo was circulating among the employees at Wolf Creek that they would get a $200 reward if they recommended a welder for employment who passed the welding test and was hired and they would be paid a $300 reward if they recommended a welder, who passed the test, was hired, and stayed until there was a general layoff.

This evidence is significant because Respondent never told the union applicants at Palo Verde anything about job opportunities at Wolf Creek but did get back to Howell about the opportunity for work at Wolf Creek after Howell had called Palo Verde and given a work history with *only* nonunion contractors.

9. With regard to the Wolf Creek Nuclear facility where Millard "JD" Howell. and James "Jay" Bragan were hired, it should be noted that Respondent did not tell any of the union

affiliated applicants for employment at Palo Verde about jobs at Wolf Creek and it was stipulated in the hearing before me that there were enough job openings at Wolf Creek to hire every single one of the discriminates in the Palo Verde portion of this litigation.

10. On September 8, 1994, union boilermaker Steve Horlacher was with Foreman Harry Sinclair after work in a bar called Boondocks. The craftsmen at this time were working very hard with large amounts of overtime and, according to Horlacher, he asked Sinclair why Respondent did not hire more of the boilermakers and other qualified crafts people who had put their applicants in. According to Horlacher, Sinclair "said that his supervisor told him that the reason why is because they put voluntary union organizer across their applications." (Tr. 292.) Horlacher said, "Harry isn't that discrimination?" and Sinclair just shrugged. (Tr. 291-393.)

Sinclair was admitted by Respondent to be an agent and supervisor of Respondent within the meaning of the Act. .

Sinclair who testified before me said he was not in Respondent's employ at the time he testified before me but wants to work for Respondent in the future. Sinclair denied he said to Horlacher what Horlacher claims he said. Arguably both Horlacher and Sinclair have motives to testify as they did. I observed the demeanor of both men and I found Horlacher to be the more credible. Needless to say the statement by a foreman that Respondent won't hire applicants who write "voluntary union organizer" on their job applications is a violation of Section 8(a)(1) as well as evidence that Respondent violated Section 8(a)(3) in its failure to hire the union affiliated applicants for employment.

11. Although the former Bechtel employees for the most part lived in the Phoenix area and could commute to Palo Verde, Respondent had to incur more cost by paying per diem to out-of-state craftsmen to work at Palo Verde. In order to

avoid hiring these union affiliated applicants Respondent was willing to incur the extra expense of per diem.

12. On August 18, 1994, Don Koza, a craft recruiter for Respondent, told union boilermaker Steve Horlacher that Respondent needed jumpers and welders. Horlacher knew that this was the kind of work that union boilermakers did and he gave Koza the phone number of Gary Evenson to call to get referrals of people who could do the work Koza told Horlacher. Respondent needed people to do. Koza never called Evenson.

13. Even though we were in trial on Respondent's alleged failure to hire union applicants who applied in June 1994 Charging Party Exhibits 27, 28, and 29, i.e., Respondent's memos of September 5, November 16, and December 5, 1995, reflect that Respondent was short on welders and fitters and was having trouble meeting its staffing needs at Palo Verde. And yet even though we were actually in trial on this case in September, November, and December 1995, Respondent took no action whatsoever to hire the union affiliated applicants in this litigation.

C. Exxon Project, Baton Rouge, Louisiana

Exxon operates a refinery in Baton Rouge, Louisiana. In October 1993 the East Coker plant at that refinery burned to the ground.

Respondent bid for, and was awarded the contract from Exxon to rebuild the East Coker plant. Work was scheduled to begin in January 1994 and be completed by July 1994. It was anticipated by Respondent that 250 people would be needed to rebuild the East Coker plant at a cost of $50 million but Respondent wound up needing 2800 people to do the job and it was not completed until December 1994 at a cost of approximately $100 million.

The construction trade unions in Baton Rouge decided to encourage their members to seek employment with Respondent so that they could get work for their members and try to organize this large open shop contractor.

The applicants who sought employment with Respondent were 'members of several different unions, i.e., IBEW Local 995, Boilermaker Local 582, Pipefitters Local 198, and Laborers Local 692. Where appropriate I will refer to the applicants as highly qualified based on the material contained in their applications in the record. The union affiliated applicants hereafter listed wore union insignia, were in a group and it is uncontested that Respondent's hiring officials knew they were union applicants.

On January 19, 1994, 10 members of IBEW Local 995 applied for employment as electricians. Respondent had a sign posted in front of its hiring office proclaiming that Respondent was hiring electricians. The applicants were as follows:

1. Edwin Cooks
2. Kelly Gauthreaux
3. Roland Goetzman
4. Don Guarino
5. Mike James
6. Robert Leleirne
7. Ronnie Penny
8. Ernest Perrault
9. Steve. Pritchard
10. Kendrick "Ricky" Russell

None of these highly trained electricians, eight of whom testified, were offered employment until late August 1994 when Ricky Russell and only Ricky Russell was offered a job. More on Russell later.

On January 25, 1994, four members of IBEW Local 995 applied for work. They were as follows:

1. Joe Aycock
2. Chris Bonnette
3. Jeff Bourg
4. Richard Fletcher

None of these highly qualified electricians, two of whom testified, were hired.

On January 26, 1994, five more highly qualified electricians applied for work. They were as follows:

1. Ricky Achord
2. Curtis Blount
3. Earl Long
4. Leon Parent
5. Dale Rispone

None of the five, there of whom testified, were hired.

On February 1, 1994, 15 men applied for work with Respondent. Seven of them were members of Pipefitters Local 198 and eight of them were members of Boilermakers Local 582. Respondent was hiring ironworkers and had posted a notice that it was hiring ironworkers. The uncontradicted testimony of numerous highly skilled craftsmen proved that pipefitters, ironworkers, and boilermakers could all do the work of iron-workers.

The applicants were as follows:

Pipefitters

1. Jeff Armstrong
2. William Blalock
3. Eugene Braud
4. Billy a Braid
5. Jeffrey Burns
6. Earnest Ford (who most likely applied on February 2, 1994)
7. Jeff Mire

Boilermakers

1. James K. Bueche
2. David Greer
3. Ed Hughes
4. John Kelly

5. JJ Leveron
6. C.A. Lewis
7. Robert H. Redden
8. A.E. Ross

None of these highly qualified applicants, 12 of whom testified, were hired.

Interestingly enough Respondent could not locate the application of boilermaker James "Kenny" Bueche. This is most interesting because Respondent claims that it did not discriminate against union affiliated applicants but simply applied its hiring preference, i.e., it would hire Fluor Daniel certified craftsmen first and then craftsmen with Fluor, Daniel experience over all others. James "Kenny" Bueche had worked for Respondent in the past and was Fluor Daniel experienced and Respondent not only did not hire him but claimed it did not even have his application.

Respondent claims it did not have an application for Pipefitter Earnest Ford and the evidence further reflects that Ford probably applied on February 2, 1994, and was not with the other union applicants on February 1, 1994.

On April 19, 1994, one union pipefitter, Donald Broussard, and five union laborers applied for jobs. The laborers were as follows:

1. Randy Strothers
2. Coleman Fee
3. Memphis Johnson
4. Johnny Durant
5. Jerry Elkins

I will dismiss the allegations regarding these six discriminatees. The five union laborers all applied for the position of rebar helper which was posted. However, Respondent did not in fact hire any rebar helpers for this project after April 15, 1994, although Respondent did sometime later transfer two

utility workers from utility worker to rebar helper positions. Supervisor Ed Strickland testified that the rebar work was properly accomplished. With respect to Donald Broussard I note that he is a young man whose application reflected no work at all in his trade for the past 2 years preceding his application. Based on his application Brossard does not appear qualified and Respondent's failure to hire him is not a violation of the Act.

On May 10, 1994, four union pipefitters applied for work for Respondent. They were as follows:

1. Steven LeBlanc
2. Terry Quatrevinght
3. Mike Wooten
4. Jeff Armstrong

These men applied because Jeff Armstrong had learned that Respondent was testing for pipefitters and he and the others went to Respondent's office to be tested as pipefitters and apply for work. They were not allowed to apply and were told that only former employees of Respondent could be tested.

In late August 1994 Respondent was advertising for electricians: On August 29 two union electricians, Kelly Browning and Mike Clary, applied and on August 30, 1994, union electrician Danny Aucoin applied. None of these highly qualified men were hired.

The record is clear that the union affiliated applicants for employment applied for work and were qualified in their craft with the exception of Broussard who well may be qualified but whose application was deficient. Further, these applicants were not hired. Still further, Respondent did hire employees for the positions these applicants applied for with the exception of the rebar-helper position and because of massive evidence of antiunion animus the only logical conclusion is that these applicants were denied hire because of their

membership in the union. Having heard the testimony of most of these discriminatees and seen their applications and the applications of those who did not testify and all the other witnesses, it is obvious that these union affiliated applicants were bona fide applicants for employment. See *Town & Country Electric, Inc.*, supra.

The evidence of antiunion animus on Respondent's part with respect to the Exxon project in Baton Rouge is as follows:

1. HR 132 is a written human resources policy document of Respondent. It is, at a minimum, a nationwide policy. It provides that applications will remain active for 60 days and any exception to the policy must be approved by Respondent's vice president for human resources. HR 132 also contains a provision that there will be a hiring preference for Fluor Daniel certified craftsmen. It does not provide for a preference for applicants with experience with Respondent but who are not certified. Suffice it to say the following memo was sent on December 1, 1993, from Ed Martinez of industrial relations to Bill Austin about the staffing procedures of Respondent at the Exxon project. Copies of this memo were sent to Dave Harris who became project manager at the Exxon project. Bill Austin was the human resources manager at the Exxon project and in charge of hiring.

The memo stated:

> In order to meet our staffing goals with qualified craft employees, and protect ourselves from unfair labor practice charges, the following preferential hiring plan is recommended for the Exxon project in Baton Rouge, Louisiana. To be effective, it is essential that this criteria be strictly adhered to. The plan requires that preferential hiring be given to applicants in the following order:
>
> (1) Fluor Daniel Certified
> (2) Fluor Daniel Experienced
> (3) Others

The following recommendations are also made in an effort to further diminish the potential for the filing of any ULP charges:

Accept job applications only when jobs are available and when we intend to fill the position(s). Ensure all active applications on file are reviewed before accepting further applications. Position(s) for which applications are being accepted should be posted at the site employment office.

It is recommended that applications be individually numbered and remain valid for 30 days.

Human Resources must be prepared to justify why one person was hired over another, particularly for non-Fluor Daniel experienced employees.

Should anyone attempt to "drop off' applications in bulk, they must not be accepted; Applications "left on the counter" should immediately be put in an envelope and mailed back to the person-or organization which left them. They should be notified as to the proper procedure for submitting an-application. If at all possible, have a witness present to view the action taken.

It is obvious that this memo from industrial relations to staffing was the game plan to discriminate in hiring against union affiliated applicants and get away with it. If there was a law that prohibited discrimination in employment against veterans of the Vietnam War, Martinez' memo would read as follows:

In order to meet our staffing goals with qualified craft employees, and protect .ourselves from charges that we discriminate against Vietnam veterans the following preferential hiring plan is recommended for the Exxon project in Baton Rouge, Louisiana. To be effective, it is essential that this criteria be strictly adhered to. The plan

requires that preferential hiring be given to applicants in the following order:

(1) Fluor Daniel Certified
(2) Fluor Daniel Experienced
(3) Others

The following recommendations are also made in an effort to further diminish the potential for the filing of any charge that we discriminate against Vietnam veterans:

- Accept job applications only when jobs are avail-able and when we intend to fill the position(s). Ensure all active applications on file are reviewed before accepting further applications. Position(s) for which applications are being accepted should be posted at the site employment office.

- It is recommended that applications be individually numbered and remain valid for 30 days.

- Human Resources must be prepared to justify why one person was hired ova' another, particularly for non-Fluor Daniel experienced employees.

- Should anyone attempt to "drop off" applications in bulk, they must not be accepted. Applications "left on the counter" should immediately be put in an envelope and mailed back to the person or organization which left them. They should be notified as to the proper procedure for submitting an application. If at all possible, have a witness present to view the action taken.

It is clear that, as modified, Respondent would be manifesting an intent and laying out a plan to discriminate against Vietnam vets and get away with it. It is obvious that the memo is the game plan on how to discriminate in employment against union affiliated applicants for employment and get away with it.

Another aspect of this memo is interesting because it varies from the provisions of HR 132 and. it is conceded by Respondent that no permission to vary from HR 132 was granted and variances were not permitted without permission. It further shows that, when it wants to vary from policy to discriminate against union applicants, Respondent simply does so, but if a policy (the 60-day period for active applications for example) assists in discriminating against union applicants that policy will be faithfully adhered to.

2. Fluor Corporation is the parent corporation for Respondent (Fluor Daniel, inc.) and its union counterpart (Fluor Constructors) and yet while there is a hiring preference for someone who has experience with Respondent (Fluor Daniel, Inc.) there is no hiring preference for craftsmen who have experience with Fluor Corporation's union counterpart.

3. There is no hiring preference for salaried personnel (engineers, etc.) who have worked in the past for Respondent but there is a hiring preference for experience with Respondent among craftsmen. Needless to say engineers are generally not organized and craftsmen might be. The rationale for the policy is not to hire people who worked for Respondent in the past and did a good job because then there would be a preference for salaried employees but the rationale for the policy is to keep out unions and if you have to discriminate in hiring against union affiliated applicants for employment to do so then do it.

4. James "Kenny" Bueche (pronounced Bush) was a union boilermaker who applied for an ironworker position on February 1, 1994, a job for which he was qualified. He is a former employee of Respondent and Respondent claims it doesn't have his application. The dilemma facing Respondent since Respondent argues that they are wedded to hiring former employees over non-Fluor Daniel applicants is how can they explain their failure to hire Bueche. They cannot do so without admitting discrimination so they claim they never

got his application. This is powerful evidence of antiunion animus and supports the overall finding that Respondent discriminated in hiring against union affiliated applicants for employment.

5. In late August 1994, Ed Martinez spoke with Rhonda Glover on the phone. Martinez is from industrial relations and was concerned about the unfair labor practice charges pending in Region 15. Glover was the person at that time in charge of craft hiring at the Exxon project.

Martinez told Glover he thought it would help the chances of Region 15 *not* issuing a complaint if Respondent could demonstrate that it hired some union affiliated applicants.

Shortly thereafter Glover did something she had never done before. Glover called Charles Dame, a young electrician and member of IBEW Local 995, and asked him to come in to the office and expand on his application by listing 42 months' experience. Dame was then offered a job and started work on September 6, 1994. Glover also hired Ricky Russell. Interestingly enough when the Respondent thought it might persuade Region 15 not to issue a complaint, Respondent found it easy to hire union affiliated applicants but not at any other time.

6. The only applicant that Glover ever asked to expand his application to list 42 months of experience was Dame. Glover testified that she regularly told applicants for journeymen positions to list 42 months' experience but with the exception of April 19, 1994, the evidence is that she never told the union applicants they had to list 42 months' experience on their applications. She and the other craft recruiter, Terry Wilson Burns, would review the applications submitted by the union applicants before the applicants left Respondent's office and although it was obvious in virtually every case that the applicants applying for journeymen jobs had listed less than 42 months' experience neither Glover nor

Bums ever told the applicants they had to list 42 months of experience, but simply looked over the application and told the applicant that it looked okay and the applicant left. The applicants would never know that they had no chance whatsoever of being hired because they did not list 42 months experience. Glover and Bums knowingly and deliberately lulled the union applicants into a false sense of security that they had applied for a job and had a chance of getting one when their real opportunity for being hired was zero.

7. Respondent, through Ed Martinez' memo, reduced the time for an application being active from 60 to 30 days. If you read Martinez' memo, spelled out in item I above it is obvious that the 60-day active period was reduced to.30 days in order to assist in Respondent's discrimination in employment against union affiliated applicants. This is demonstrated by the fact that many high ranking officials of Respondent could offer no justification whatsoever for the reduction from 60 to 30 days, e.g., David Bordages, vice president of human resources, David Harris, Respondent's project manager for the Exxon project, Bill Austin, human resources manager at Exxon project in January 1994 and February 1994, Rhonda Glover, craft recruiter, and then Austin's successor as human resources manager at the Exxon project.

The rationale for the 60-day rule, according to Respondent's own witnesses, is that after 64 days most craftsmen will have found other work and no longer be interested in employment. This rationale breaks down in this case because by filing charges and pursuing litigation the applicants showed they were still interested in employment with Respondent.

8. Respondent's treatment of Jeff Armstrong is most telling. Armstrong is a paid union organizer for Pipefitters Local 198. On four occasions he went to Respondent's hiring office in Baton Rouge to apply for work at the Exxon project,

i.e., February 1, April 19, May 10, and July 20, 1994. He was rejected for employment all four times.

According to craft recruiter Rhonda Glover, Armstrong was "underqualified" when he applied for an ironworkers job on February I, 1994, because he did not list 42 months of qualifying experience but only 18 months of experience but she accepted his application and never said it was incomplete even though she looked it over.

According to Glover, Armstrong was "overqualified" for the pipefitter helper position Armstrong applied for on April 19, 1994. She claimed she did not like hiring journeyman for helper positions because they would be unhappy making less pay. Yet she hired many journeymen into helper positions but only if the person had worked for Respondent in the past but could not be hired as a journeymen because, for example, they had failed the welding test.

According to Glover, when Armstrong applied to take a pipefitter test and be hired as a pipefitter on May 14, 1994, he was told he could not take the pipefitter test because it was being given only to former employees of Respondent and not to anyone who had not previously worked for Respondent. He was not "qualified" to take the test because he had not worked previously for Respondent.

According to Glover, when Armstrong applied on July 20, 1994, for a job as an instrument helper she did not hire him because he was "overqualified."

Respondent had posted and was hiring ironworkers on February 1, pipefitter helpers on April 19, pipefitters on May 10, and instrument helpers on July 20, 1994. Armstrong was well qualified for each of these positions but Glover would not give him the time of day. Armstrong, it is clear, never had any chance whatsoever of being hired by Respondent and it was because he was a union affiliated craftsman. This is blatant discrimination.

9. As shown above, union electricians and union pipefitters applied for work with Respondent and were not hired. Their continued interest in being offered employment was manifested by charges filed on their behalf by their unions with Region 15 in New Orleans.

Nevertheless in August and September 1994 Respondent was in such desperate need of electricians, pipefitters, and welders that is subcontracted with ISC for electricians, with Harmony for pipefitters, and with J. E. Merit for pipefitters and welders. Needless to say ISC, Harmony, and J. E. Merit are all nonunion contractors.

10. Respondent claims that it religiously followed its policy of giving hiring priority first to Fluor Daniel certified craftsmen and then to Fluor Daniel experienced craftsmen, and while giving preference to applicants for employment makes sense and is legal if done because an employer wants employees who it knows from past experience are good workers the implementation of the policy must be reasonable. All too often it was anything but reasonable and was an excuse to not hire union affiliated applicants, for example, the following Fluor Daniel experienced applicants were hired over union applicants with impeccable records: Ryan Smith (guilty of possession of illegal weapon or alcohol), Claude Honnycutt (who had been fired three times in the past by Respondent for absenteeism), Kim Kittrell (who had been fired by Respondent for absenteeism and for failing a drug test), Claude Fortson (who had been fired twice for absenteeism and once for insubordination), Thomas Blacknon (whose coded entry reflected he had previously been fired by Respondent for endangering the safety of himself or others on the job), Thurmond Almaroad (who had been fired for insubordination), and Robert P. Jones (who had previously been convicted of assault with intent to kill).

11. Respondent was in such dire need of pipefitters, welders, and electricians that it sent out on September 21,

1994, 11,000 mailgrams to former employees looking for pipefitters and welders, it sent out on September 30; 1994, 9218 mailgrams to former employees looking for pipefitters and on October 7, 1994, it sent out 3300 mailgrams to former employees looking for electricians.

It cost 42 cents each to send out a mailgram and Respondent incurred this cost rather than consider and hire the union affiliated applicants-who had applied for work and whose applications Respondent still had in its possession at the jobsite and who were pressing their job discrimination claims through Region 15 of the National Labor Relations Board.

12. Although Glover claimed that she always told journeymen applicants that they had to list 42 months of experience on their applications, and since most of the union affiliated applicants did not do so Respondent properly rejected them for employment. However, when confronted with the fact that many applicants who were hired had also not listed 42 months of experience Glover said that former employees of Respondent did not have to list 42 months of experience because the craft recruiter (her or someone else) could check their work experience in Respondent's computer by typing in the applicant's name and social security number. There is, 1 note, nothing on the application that provides you must list 42 months of experience if applying for a journeyman position.

13. Although Glover claimed she told all applicants of the 42 months' rule many discriminatees credibly testified that they were never told they had to list 42 months' experience, e.g., A. E. Ross, Kelly Browning, C. A. Lewis, Richard Fletcher, David Greer, William Blalock, Curtis Blount, John Kelly, Kelly Gauthereaux, Danny Aucoin, Ricky Achord, Jeff Burns, Ernest Green, Edwin Cook, Eugene Braund, Ricky Russell, Don Guarino, and Joe Aycock.

There was space on the application form for information about six prior jobs and although the form states that all prior employment should be listed and continuation sheets can be used continuation sheets were not routinely made available and people were not told that they were available if any event.

In the construction business employees go from job to job and, as A. E. Ross testified, if he listed every job his application would be the size of a telephone book.

The fact is these applicants were looking for work and had 42 months of experience, and would have and could have listed 42 months if they had been told that they would not be considered for employment if they had not listed 42 months of experience.

14. The experience of Charles Dame is also most telling. Dame engaged in concerted protected activity in complaining about a noxious gas emission and the lack of scaffolding on the jobsite.

On October 6, 1994, electrical foreman Doug Robinson told Dame to "quit fucking up." The only parties to this encounter were Dame and Robinson. Robinson denied he ever said this to Dame. I credit Dame. If Dame wanted to lie why not select a higher official of Respondent then a first line foreman. Robin-son still works for Respondent and was not about to admit he said something that may hurt Respondent's case. This implied threat is a violation of Section 8(a)(1) of the Act.

15. A few days later Dame went on strike against Respondent claiming it was a unfair labor practice strike because of Respondent's failure to hire union affiliated applicants for employment.

At the time he went on strike Dame was hired by another contractor, J. E. Merit, which contractor was also working at the Exxon refinery.

All employees who worked at the Exxon project wore badges issued by Exxon security. Exxon had a rule that employees could not be badged to more than one contractor. The basis for this rule was safety and accountability. If there was a major accident at the site Exxon wanted a good handle on who was on site. An employee could only have one security badge.

When Dame wanted to get a security badge to go on site to work for J. E. Merit he was told by Exxon security that he could not be issued a badge to get on site to work for J. E. Merit until Respondent turned in the security badge issued Dame as a result of his employment with Respondent. Respondent, claiming Dame was still their employee but on strike, refused to release Dame's security badge to Exxon and Exxon would not issue a new security badge to Dame and as a result Dame could not go to work for J. E. Merit.

Needless to say Respondent could have easily released Dame's security badge to Exxon security and kept Dame on their .rolls as an employee. Their failure to do is evidence of union animus as well as a separate violation of Section 8(a)(1) and (3) of the Act.

16. Ricky Russell was hired in late August 1994. Russell is a union business agent for IBEW Local 995. After he was hired Russell tried to organize the employees and was told, at one point, by Supervisor James Laws that he was being disciplined or was going to be disciplined for union solicitation during what Laws claimed was worktime but what Russell said was breaktime. In any event Russell was not disciplined and I find no violation of the Act.

Michael Albritton, an employee of Respondent, testified that after Russell was hired he had a conversation with his foreman Clint Bamber. Albritton testified as follows:

A. Mr. Bamber came in and he said he had something to tell us. He said it could get him in a lot of trouble

if he told us, but that he felt like we had a right to know who we was working with. And he went on to tell us that he could get-in trouble and all for it.

Q. Did he explain what it was that—

A. He told us that Ricky Russell had hired in, and during orientation that he had stood up and told everybody he was organizing for the union and passed out union literature. And he said the hiring office must not know what they doing because Ricky Russell was the B.A. in Baton Rouge.

Q. Did you say anything to him—or to Mr. Bamber at that time?

A. We was just listening to him mainly because, you know, he was telling us, I guess, in confidence.

Q. Do you know what a B.A. is?

A. I did not at that time.

Q. And when did you learn what a B.A. was?

A. I asked him what a B.A. was, and—

Q. Well, who is him?

A. Clint Bamber.

Q. Okay.

A. And he told me that he was a head man for the union.

Q. And was this during your conversation with regards to Ricky Russell that evening in the motor control room?

A. It was.

Q. After he explained to you what a B.A. was do you recall him saying anything else? Let me withdraw that question. Did Mr. Russell work on your crew?

A. No, he did not.

Q. Do you know whose crew he worked on?

A. He was—Clint was he—Mr. Bamber said he wanted to get him in our crew, but they had-so he could get rid of him. But they had already placed him in Marshall's—Martin's crew.

Q. Who is Martin?
A. Martin was another electrical foreman on the job.

REMEDY

The remedy in this case should include a cease-and-desist order, the posting of an appropriate notice, the offering of positions to those applicants unlawfully refused hire because of their union affiliation and a make whole remedy for lost wages and benefits.

With respect to Palo Verde, if Respondent still has the service and maintenance contract with Arizona Public Service, those discriminatees (all of whom with the exception of Gary Evenson worked at Palo Verde for Bechtel Corporation) can be offered employment there.

With respect to the Exxon project I note that the building of the East Coker plant is completed. Respondent, however, moves from project to project and those applicants for employment unlawfully denied employment at the Exxon project can be offered jobs at other current projects of Respondent.

Those discriminatees who were unlawfully denied employment as journeymen at either Palo Verde or Exxon should be permitted to be tested to be certified by Respondent in the craft for which they were unlawfully denied employment.

I will not disturb Respondent's hiring preference for Fluor Daniel certified or experienced applicants but it is to be used in the future only in a lawful manner. With respect to the 60-day period for applications remaining active at Palo Verde and the 30-day period for applications remaining active at Exxon these rules should not be used to discriminate. In law school one learns the concept that "the law abhors a vain act" and to require these applicants to have reapplied every 60 or 30 days when there were openings would be to ask them to

engage in vain acts because Respondent had no intention of hiring them because of their union affiliation.

It should be noted that Respondent's practice was to keep all applications for employment for 1 year and only them to send the applications to storage. The applications were never destroyed.

The *Board in Hickmott Foods*, 242. NLRB 1357 (1979), held that a broad cease and desist order requiring a Respondent to tease and desist from "in any other manner" rather than the narrow "in this or any like manner" language should be reserved for situations where a Respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

In light of the violations of the Act I find herein and bearing in mind prior litigation involving this same Respondent, i.e., *Fluor Daniel I*, supra, and *Fluor Daniel II*, supra, I will recommend a broad cease and desist order because of Respondent's demonstrated proclivity to violate the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The three Charging Party unions are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when its foreman Harry Sinclair at the Palo Verde project told an employee that applicants who write voluntary union organizer on their applications would not be hired.

4. Respondent violated Section 8(a)(1) of the Act when its foreman Doug Robinson at the Exxon project threatened an

employee with unspecified reprisals for concertedly complaining about safety and health issues on the project.

5. Respondent violated Section 8(a)(1) and (3) of the Act when its supervisors and agents refused to release Charles Dame's security badge thereby preventing him from working for another contractor on the Exxon project after Dame had gone on strike against Respondent.

6. Respondent violated Section 8(a)(1) and (3) of the Act when it failed and refused to offer positions to any of discriminatees listed below in paragraph 2 of my recommended Order because of their union affiliation.

7. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[Recommended Order omitted from publication.]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Jun 10, 2004]

Nos. 01-1337/1448

FLOUR DANIEL, INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,
and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, *et al.*,
Intervenor.

ORDER

BEFORE: BOGGS, *Chief Judge*, DAUGHTREY and COLE, *Circuit Judges*.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
LEONARD GREEN, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Mar 1 2004]

Nos. 01-1337/1448

FLUOR DANEL, INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,
and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO,
Intervenor,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS. LOCAL UNION NO. 995, AFL-CIO,
Intervenor,

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, PLUMBERS & STEAMFITTERS LOCAL UNION NO. 198. AFL-CIO,
Intervenor.

JUDGMENT

Before: BOGGS, *Chief Judge*; DAUGHTREY, and COLE, *Circuit Judges*.

THIS CAUSE came on to be heard upon a petition filed by Fluor Daniel, Inc., to review an order of the National Labor Relations Board in Board Case Nos. 15-CA-12544, 15-CA-

12666, 15-CA-12723,15-CA-12852, 15-CA-12936, 15-CA-12938, 28-CA-12750 and 28-CA-13357, issued against said Petitioner, its officers, agents, successors, and assigns, on March 2, 2001, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on February 5, 2003, and has considered the briefs and transcript of record filed in this cause. On June 9, 2003, the Court, being fully advised of the premises, handed down its opinion granting enforcement in part of the Board's Order and remanding the case in part to the Board for further proceedings consistent with the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Fluor Daniel, Inc., Wintersburg, Arizona, and Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Restraining or coercing employees or applicants for employment in the exercise of their rights by telling them that those applicants who write "voluntary union organizer" on their applications will not be hired

(b) Threatening employees with unspecified reprisals because they engage in protected concerted activity.

(c) Discouraging employees from engaging in activities on behalf of a labor organization by refusing to consider or hire job applicants because they are members or supporters of unions, or because they indicate on their employment applications that they are voluntary union

(d) In any other manner interfering with, restraining, or coercing employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to the below listed individuals employment in the positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights and privileges.

Palo Verde Project

(Applicants who filed their applications in June 1994)

Boilermakers

John Allen
Chester Arthur
James Begay
Gary Clark
William Deen
Francisco Diaz
Jerry Dillon
Leslie Dixon
Gary Evenson
Wayne Fern
Michael Harvey
Robert Logue
Dan Mourney
Rudy Pariga
Vern Price
William Quallis
Ira Sexton
Gary Sly
Curtis Veich
Larry Voorhees
Ernie Wilden

Electrician

John Starkel

Insulators

Michael Bradley
Ed Martinez
Frank Naccarato

Millwrights

Peter Apostoles
Melvin Boyd
Lee Braudt
Gary Brinlee
Albert Charter
Frank Cody
John Cooper
Joe Hammons
Peter Kornmuller
Lloyd Landers
Jack Martyn
Michael McQuarrie
William Miles
Wylie Miller
William Oviedo
John Spiller
Roger Stone
Michael Swarthout
Frank Troester
Michael Valdez
Richado Valdez

Ironworkers

Tony Allen Sr.
Mel Brubaker
Jim Lehmann
Lance Mendel
Martin Murphy
Floyd Smith

Palo Verde Project

(Applicants denied opportunity to file applications on June 27, 1994)

Insulators

James Arias
Abondio Cabrera
Robert Cabrera
Curtis Case
James Cruill
William Howlier
Mark Kasdorf
Dennis Moya
Kelvin Patton
Jose Sanchez

Painters

Julio Garcia
Greg Stroud

Boilermakers

Michael Goodman
Mike Leslie
Joseph Wood

Carpenters

Francis Chancy
Don Shoemaker
Johnny Tyler Jr.

Sprinkler Fitter

John Rahn

Ironworkers

Linda Hayes
Steve Padilla
Ron Richards

Cement Masons

Waymond Parker
Charles Walsh

Millwrights

Clyde Hafeli
Ken Hayes

Palo Verde

(Applicant first told in August 1995 that Respondent needs welder and then told, after he says he is union and wants to organize, that Respondent does not need welders at that time)

Boilermaker

Mark Winham

Exxon Project

Electricians

Danny Aucoin
Ricky Achord
Joe Aycock
Chris Bonnette
Kelly Browning
Jeff Bourg
Curtis Blount
Edwin Cooks
Mike Clary
Richard Fletcher
Kelly Gauthreaux
Wallace Roland Goetzman
Dan Guarino
Mike James
Earl Long
Robert LeJeunc
Leon Parent
Ronnie Penny
Ernest Perrault
Steve Pritchard
Dale Rispone
Kendrick "Ricky" Russell

Pipefitters

Jeff Armstrong
William Blalock
Eugene Braud
Billy D. Breaud
Jeffrey Bums
Ernest Ford
Jeff Mire
Steven LeBlanc
Terry Quatrevingt
Mike Wooten

Boilermakers

James "Kenny" Bueche
David Greer
Ed Hughes
John Kelly
J. J. Leveron
C. A. Lewis
Robert H. Redden
A. E. Ross

(b) Make the individuals listed in paragraph 2(a) above whole for any loss of pay and other benefits suffered by them as a result of the discrimination against them and make Charles Dame whole for any loss of pay and other benefits suffered by him as a result of Respondent's refusal to release his security badge to Exxon, backpay to be computed in compliance with F. W. Woolworth Co., 90 NLRB 289 (1950), with interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

(c) Permit the individuals listed in paragraph 2(a) above to be tested to be certified by the Respondent in the craft for which they were unlawfully denied employment.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider or hire, and within 3 days thereafter notify the individuals listed in paragraph 2(a) that this has been done and that the refusal to consider and hire will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Regions, post at all of its jobsites within 75 miles of the Palo Verde Nuclear Generating Station in Palo Verde, Arizona and at all jobsites within 75 miles of the Exxon Project in Baton Rouge, Louisiana, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Directors for Region 15 and 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at Palo Verde and Exxon during the time of the discriminatory conduct.

(g) Within 21 days after service by Regions 15 and 28, file with the Regional Directors a sworn certification of a responsible official on a form provided by the Regions attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED AND ADJUDGED that this case be and it hereby is remanded to the Board for the Board to consider the issue or the five rebar helpers consistent with the Court's opinion.

The mandate of the court shall issue forthwith.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coerce: employees or applicants for employment in the exercise of their rights by telling them that those applicants who write "voluntary union organizer" on their applications will not be hired.

WE WILL NOT threaten employees with unspecified reprisals because they engage in protected concerted activity.

WE WILL NOT discourage employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants because they are members of or supporters of unions, or because they indicate on their employment applications that they are voluntary union organizers.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights protected by the Act.

WE WILL offer to the below listed individuals employment in positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

Palo Verde Project

Boilermakers

John Allen
Chester Arthur
James Begay
Gary Clark
William Deen
Francisco Diaz
Jerry Dillon
Leslie Dixon
Gary Evenson
Wayne Fern
Michael Harvey
Robert Logue
Dan Mourney
Rudy Pariga
Vern Price
William Quallis
Ira Sexton
Gary Sly
Curtis Veich
Larry Voorhees
Ernie Wilden

Electrician

John Starkel

Insulators

Michael Bradley
Ed Martinez
Frank Naccarato

Millwights

Peter Apostoles
Melvin Boyd
Lee Braudt
Gary Brinlee
Albert Charter
Frank Cody
John Cooper
Joe Hammons
Peter Kornmuller
Lloyd Landers
Jack Martyn
Michael McQuarrie
William Miles
Wylie Miller
William Oviedo
John Spiller
Roger Stone
Michael Swarthout
Frank Troester
Michael Valdez
Richado Valdez

Ironworkers

Tony Allen Sr.
Mel Brubaker
Jim Lehmann
Lance Mendel
Martin Murphy
Floyd Smith

Palo Verde Project

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James Arias
Abondio Cabrera
Robert Cabrera
Curtis Case
James Cruill
William Howlier
Mark Kasdorf
Dennis Moya
Kelvin Patton
Jose Sanchez

Painters
Julio Garcia
Greg Stroud

Boilermakers
Michael Goodman
Mike Leslie
Joseph Wood

Carpenters
Francis Chancy
Don Shoemaker
Johnny Tyler Jr.

Sprinkler Fitter
John Rahn

Ironworkers
Linda Hayes
Steve Padilla
Ron Richards

Cement Masons
Waymond Parker
Charles Walsh

Millwrights
Clyde Hafeli
Ken Hayes

Palo Verde

Boilermaker
Mark Winham

Exxon Project

Electricians
Danny Aucoin
Ricky Achord
Joe Aycock
Chris Bonnette
Kelly Browning
Jeff Bourg
Curtis Blount
Edwin Cooks
Mike Clary
Richard Fletcher
Kelly Gauthreaux
Wallace Roland Goetzman
Dan Guarino
Mike James
Earl Long
Robert LeJeunc
Leon Parent
Ronnie Penny
Ernest Perrault
Steve Pritchard
Dale Rispone
Kendrick "Ricky" Russell

Pipefitters
Jeff Armstrong
William Blalock
Eugene Braud
Billy D. Breaud
Jeffrey Bums
Ernest Ford
Jeff Mire
Steven LeBlanc
Terry Quatrevingt
Mike Wooten

Boilermakers
James "Kenny" Bueche
David Greer
Ed Hughes
John Kelly
J. J. Leveron
C. A. Lewis
Robert H. Redden
A. E. Ross

WE WILL make the above listed applicants whole for any loss of pay and other benefits, with interest, and make whole Charles Dame for loss of pay and other benefits as a result of our unlawful refusal to release his security badge, with interest.

WE WILL permit the above listed individuals to be tested to be certified in the craft for which they were unlawfully denied employment.

WE WLL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider and hire the above-named discriminates and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to consider and hire them for employment will not be used against them in any way.

FLUOR DANIEL, INC.

(2)

No. 04-350

DEC 15 2004

In the Supreme Court of the United States

FLUOR DANIEL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the determination of the National Labor Relations Board that petitioner violated the National Labor Relations Act by refusing to hire union-affiliated applicants based on antiunion animus.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	14
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Casino Ready Mix, Inc. v. *NLRB*, 321 F.3d 1190 (D.C. Cir. 2003)	20
Director, Office of Workers' Comp. Programs v. *Greenwich Collieries*, 512 U.S. 267 (1994)	15
FES (A Division of Thermo Power), 331 N.L.R.B. 9 (2000), enforced, 301 F.3d 83 (3d Cir. 2002)	2, 3, 10, 20
Little Rock Elec. Contractors, Inc., 336 N.L.R.B. 146 (2001), enforced, 50 Fed. Appx. 570 (4th Cir. 2002)	20
Masiongale Elec.-Mech., Inc. v. *NLRB*, 323 F.3d 546 (7th Cir. 2003)	19, 20
Moses Elec. Serv., Inc., 334 N.L.R.B. 567 (2001), enforced, No. 02-60016 (5th Cir. July 15, 2002)	20
NLRB v. *Fluor Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998)	2, 12
NLRB v. *Interstate Builders, Inc.*, 351 F.3d 1020 (10th Cir. 2003)	20
NLRB v. *Pneu Elec., Inc.*, 309 F.3d 843 (5th Cir. 2002)	20
NLRB v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983)	2, 14, 18
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941)	2
Starcon, Inc. v. *NLRB*, 176 F.3d 948 (7th Cir. 1999)	2, 19

Cases—Continued: Page

Ultrasystems W. Constructors, Inc. v. *NLRB*, 18 F.3d 251 (4th Cir. 1994) 2, 19
Wisniewski v. *United States*, 353 U.S. 901 (1957) 18
Wolfe Elec. Co., 336 N.L.R.B. 684 (2001), enforced, 314 F.3d 325 (8th Cir. 2002) 20
Wright Line, 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982) 2

Statutes:

Administrative Procedure Act, 5 U.S.C. 556(d) 15
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 9
§ 8(a)(3), 29 U.S.C. 158(a)(3) 2, 9, 16, 18

In the Supreme Court of the United States

No. 04-350

FLUOR DANIEL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 332 F.3d 961. The decision and order of the National Labor Relations Board (Pet. App. 26a-80a) and the decision of the administrative law judge (Pet. App. 81a-122a) are reported at 333 N.L.R.B. 427.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2003. A petition for rehearing was denied on June 10, 2004 (Pet. App. 123a). The petition for a writ of certiorari was filed on September 3, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(3), makes it an unfair labor practice to "discriminat[e] in regard to hire" to "discourage membership in any labor organization." Section 8(a)(3)'s protection of employees against "discrimination in regard to hire" extends to applicants for employment. See *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 185-186 (1941). In determining whether the refusal of an employer to hire an applicant is unlawfully motivated, the National Labor Relations Board (Board) for many years applied the same causation test it applies to assess the legality of a discharge. That test for discharges, known as the *Wright Line* test (see *Wright Line*, 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)), was approved by this Court in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 400-403 (1983).

Several courts of appeals questioned the Board's use of *Wright Line* in the refusal-to-hire context.[1] In response to those concerns, the Board, in *FES (A Division of Thermo Power)*, 331 N.L.R.B. 9 (2000), enforced, 301 F.3d 83 (3d Cir. 2002), refined the *Wright Line* test to take account of differences between refusal-to-hire cases and discharge cases. The Board explained that, unlike in a discharge case which concerns the reasons that an alleged discriminatee was removed from the employer's work force, the issue in a refusal-to-hire case—*viz.*, why the applicant was not hired into the

---

[1] See *NLRB* v. *Fluor Daniel, Inc.*, 161 F.3d 953, 966-967 (6th Cir. 1998); *Starcon, Inc.* v. *NLRB*, 176 F.3d 948 (7th Cir. 1999); *Ultrasystems W. Constructors, Inc.* v. *NLRB*, 18 F.3d 251 (4th Cir. 1994).

work force—presupposes that there were appropriate employment openings available to the applicant. Accordingly, the Board held that in refusal-to-hire cases the General Counsel must establish:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants.

Id. at 12. The Board further explained that, once those elements are established, "the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union * * * affiliation." *Ibid.*

2. Petitioner is a large, general construction contractor. Pet. App. 29a, 81a. Petitioner is the nonunion subsidiary of Fluor Corporation, a holding company that also has a union subsidiary, Fluor Constructors. *Id.* at 3a, 31a, 83a-84a. When staffing projects, petitioner typically applies its hiring priority policy. *Id.* at 3a, 32a, 85a. Under that policy, petitioner gives first preference to its previous employees, who have been certified through petitioner's in-house craft certification program. *Ibid.* Petitioner then looks to hire applicants with previous "Fluor Daniel" experience only. *Id.* at 4a, 85a. Lastly, petitioner reviews all other applicants. *Ibid.* Petitioner has excluded unionized labor from its hiring preference because, in its view, union employees

would be loyal to the union rather than to petitioner. *Id.* at 31a-32a, 111a.

In 1993, petitioner won bids for two contracting projects: one to take over maintenance of the nuclear power plant at the Palo Verde Nuclear Generating Station in Arizona; and the other to rebuild a coker plant destroyed by fire at an Exxon refinery in Louisiana. Pet. App. 3a, 33a, 86a-87a, 103a. Once petitioner had secured the Palo Verde and Exxon projects, area trade unions decided to allow members to apply for work at those jobs as "voluntary union organizers" (VUOs). *Id.* at 5a, 36a, 89a. VUOs agreed to accept employment if offered, to stay until laid off, and to avoid engaging in aggression or sabotage. *Id.* at 5a, 36a.

a. *Palo Verde.* The Palo Verde Nuclear Generating Station, the largest nuclear power facility in the United States, was built by Bechtel Corporation (Bechtel), a union contractor. Until petitioner's successful bid, Bechtel maintained the power plant under contract with the Arizona Public Service Corporation (APS). Bechtel-Palo Verde employees underwent extensive background checks and were assigned security clearances. Pet. App. 3a, 4a, 33a, 87a-88a.

Before bidding on the Palo Verde job, petitioner performed a wage survey of the Phoenix area. Pet. App. 33a. The survey report concluded that petitioner would need to look in other parts of the country to find "open shop" metal craft employees with nuclear experience, because hiring locally in those crafts presented petitioner's "greatest risk" of employing union workers. *Id.* at 33a-34a. Petitioner's bid to APS stated that it had "determined that an open shop labor posture can best meet our goals," and stressed that it had successfully made the transition from union shop to open shop many times. *Id.* at 4a, 5a, 34a. The proposal assured APS

that "open shop" meant that employees would be loyal to APS and petitioner rather than to a union, and emphasized that petitioner had a national network of nonunion craft workers from which to recruit and fill positions. *Id.* at 34a.

Palo Verde staffing commenced in June 1994; and by February 1996, petitioner had hired 962 craft employees from the 1261 employees who applied for work. Pet. App. 5a, 35a, 56a. Petitioner relied on telephone and mailgram recruiting of former nonunion employees, including many living outside Arizona. *Id.* at 5a. Petitioner also recruited heavily from other sources, including individuals who had never worked for petitioner or for any other nuclear facility. *Id.* at 52a. Although petitioner had represented in its bid proposal that it would canvass the incumbent, experienced Bechtel employees for nuclear workers with acceptable skills, petitioner did not make an effort to recruit from the unionized Bechtel workforce. *Id.* at 34a, 52a.

Between June 16 and June 27, 1994, 77 VUOs and one paid union organizer applied for positions with petitioner at Palo Verde. Pet. App. 50a & nn.40-41, 88a-89a. All of the VUOs were former Bechtel employees with nuclear and hazardous work experience, and all had worked at Palo Verde for many years in the same jobs for which they were applying; some were even applying for the job they were then performing. *Id.* at 50a & nn.40 & 42, 51a, 88a. All had worked inside the reactor containment performing hazardous work that required superior training and skill. *Id.* at 50a-51a. None of those applicants was hired. *Id.* at 50a.[2]

---

[2] The first group of VUOs applied on June 16 for boilermaker positions. All other applicants applied for comparable work bearing different job titles, such as "ironworker," "millwright," and

Petitioner did hire some VUO candidates at Palo Verde when it had no knowledge of their union affiliation. Pet. 18 n.3. In mid-August, Mark Smith and Steve Horlacher applied for employment as boilermakers without wearing union insignia, and both were hired. Pet. App. 53a, 90a, 100a. Petitioner told Smith and Horlacher that petitioner needed welders with nuclear experience. *Id.* at 53a, 100a, 103a. Horlacher advised petitioner that the Union could supply experienced welders and gave petitioner the union organizer's card, but petitioner never contacted the organizer. *Id.* at 53a n.47. On July 27, 1994, petitioner hired welder Danny Garnica when he was not wearing his union insignia and had not identified himself as union-affiliated. *Id.* at 95a-96a.

In sum, of the 111 employees hired for petitioner's base crew at Palo Verde, approximately one-third had no prior nuclear experience. Pet. App. 52a. Of the total craft employees hired, more than one-quarter were off-the-street applicants, normally accorded the lowest hiring priority under petitioner's policy. *Id.* at 56a. Of the 200 former Bechtel employees who submitted

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"pipefitter." Pet. App. 52a & n.46. Petitioner allowed several of the VUOs to apply for the position of "boilermaker," then placed those applications into a dead file designated for nonbudgeted positions. *Id.* at 53a. On June 27, an additional 26 VUOs tried to apply for employment but petitioner refused to accept their applications and did not tell them to check back for possible openings. *Id.* at 53a-54a, 88a. Petitioner's recruiter, a millwright, also informed the VUOs that no vacancies were expected in his craft in the next 60 days. *Id.* at 54a. During the subsequent 60-day period, petitioner accepted additional non-VUO applications. After June 27, petitioner hired 68 nonunion applicants. It also told other nonunion applicants to check back in case of no-shows. *Ibid.* Many of the post-June 27 hires had no prior nuclear experience; some of the non-preferenced applicants had no relevant experience. *Id.* at 55a.

applications, petitioner hired 91—none of whom was a VUO or presented indicia of union activity beyond his presumed union membership by virtue of his past employment with Bechtel. *Id.* at 52a, 56a. Finally, petitioner's business reports revealed as many as 892 known deviations from its hiring rules, with significant numbers of applications containing more than one deviation and with no deviation inuring to the benefit of a single VUO. *Id.* at 56a-57a.

b. *Exxon.* Petitioner was awarded the Exxon contract in October 1993. Pet. App. 34a, 103a. In December 1993, an official of petitioner's industrial relations department issued a memorandum directing recruiters to reduce the period during which applications were considered active to 30 days, instead of the 60-day period normally adhered to by petitioner. *Id.* at 34a-35a, 113a. The purpose of the directive was to "protect ourselves from unfair labor practice charges" while "remaining nonunion on direct-hire jobs." *Id.* at 34a-35a & n.18, 108a, 111a.

Exxon staffing commenced in January 1994; and by December 1994, when the project ended, petitioner had hired nearly 2800 employees. Pet. App. 35a. Petitioner solicited applications from former employees by mailgram, contacted other jobsites that were closing, and maintained a telephone log of persons calling petitioner for work. *Id.* at 6a. Between late December 1993 and January 19, 1994, petitioner accepted nearly 700 applications in all crafts, regardless of whether there were openings in the craft or whether the applications were likely to be acted upon within 30 days. *Id.* at 6a, 37a.

Between January 25 and August 30, groups of VUOs submitted applications at the Exxon recruiting office on several occasions. Pet. App. 38a & n.23. All of those applicants were well qualified, most had 20 to 30 years

of experience in their trade, and most had completed a 48-month apprenticeship, which exceeded petitioner's 42-month qualification requirement. *Id.* at 38a & n.24, 43a, 44a-45a, 104a-106a. Recruiters did not tell the VUOs that their applications would be valid for only 30 days or that journeyman applications had to reflect 42 months of craft experience, although they routinely told other applicants to list 42 months. *Id.* at 38a-39a, 112a-113a. When VUOs called to follow up on their applications, recruiters failed to advise them that their applications were lacking the 42-month experience requirement, but recruiters did inform the applicants that their applications had expired because of the 30-day rule. *Id.* at 39a, 113a. Petitioner routinely made exceptions to its hiring rules in favor of other applicants. *Id.* at 40a. For example, petitioner hired former-employee applicants without 42 months of craft experience who had never submitted an application or whose application had expired under the 30-day rule. *Id.* at 41a-43a, 45a.

In August 1994, petitioner determined that it would improve its chances of avoiding issuance of a complaint by the Board's General Counsel if it could show that it hired some union-affiliated applicants. That month, petitioner hired two known union activists. Pet. App. 39a, 112a. Petitioner otherwise did not hire, interview, or contact any VUO applicant. *Id.* at 38a, 104a-106a, 111a-112a.

3. Acting in response to charges filed by the Unions,[3] the Board's General Counsel issued a con-

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[3] International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO; Plumbers and Steamfitters Local Union No. 198 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; Inter-

solidated complaint, alleging, *inter alia*, that petitioner violated Section 8(a)(1) and (3) of the NLRA, 29 U.S.C. 158(a)(1) and (3), by refusing to hire job applicants at its Palo Verde and Exxon construction sites because of their union affiliation. Pet. App. 7a, 81a-82a.

a. An administrative law judge (ALJ) sustained those allegations in pertinent part after holding 51 days of hearings. Pet. App. 81a-122a. The ALJ concluded that petitioner failed and refused to hire 79 job applicants at its Palo Verde project and 40 job applicants at its Exxon project because of the applicants' union affiliation. *Id.* at 7a, 86a, 90a-94a, 104a-107a, 122a.

With respect to Palo Verde, the ALJ found that the 78 VUOs who applied for or tried to apply for employment "possessed skills that were needed by [petitioner] and applied for jobs [for] which [petitioner] later hired literally hundreds of other applicants." Pet. App. 88a. The ALJ further found that the "record contains massive amounts of evidence which demonstrate anti-union animus," and that "these union affiliated applicants for employment were denied hire because of their union affiliation." *Id.* at 98a. The ALJ noted that petitioner preferred an open shop policy and that hiring union members threatened that policy because they "could conceivably seek union representation and ultimately, a collective bargaining agreement." *Ibid.* The ALJ also relied on the fact that petitioner hired no former Bechtel employees who self-identified as VUOs, but did hire former Bechtel employees when it was unaware of their VUO status. *Id.* at 99a-102a. In addition, the ALJ observed, petitioner expended considerable resources to avoid hiring the VUO Bechtel em-

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national Brotherhood of Electrical Workers, Local Union No. 995. Pet. App. 7a, 81a.

ployees, including paying a per diem to out-of-state craftsmen while ignoring VUOs who lived locally. *Id.* at 102a-103a.

With respect to Exxon, the ALJ found that all of the union-affiliated applicants were "highly qualified" in their craft. Pet. App. 104a-107a. The ALJ further found, based on the "massive evidence of antiunion animus," that "these applicants were denied hire because of their membership in the union." Pet. App. 107a-108a. Central to that conclusion was the memorandum clarifying petitioner's hiring preference for nonunion applicants and directing recruiters to reduce the period of time applications remained active from 60 days to 30 days. See *id.* at 108a-109a. The ALJ also observed that petitioner hired two union-affiliated applicants in an effort to avoid issuance of a complaint, *id.* at 112a-113a, and that the other qualified union-affiliated applicants were not hired despite petitioner's dire need for workers, *id.* at 114a-116a.

b. The Board affirmed the ALJ's findings and conclusions in pertinent part, Pet. App. 26a-80a, holding that petitioner "refused to consider and hire the discriminatees at Exxon and Palo Verde because of its unlawful antipathy to their union status," *id.* at 58a; see *id.* at 27a-28a. Applying the test for refusals-to-hire established in *FES*, 331 N.L.R.B. at 9, see pp. 1-2, *supra*, the Board determined: "[petitioner] was hiring throughout the period when discriminatee applicants applied or unsuccessfully sought to apply for employment at the Exxon and Palo Verde sites"; "those discriminatees were well qualified and experienced applicants for the positions they sought"; and "the record is replete with evidence that antiunion animus factored heavily in [petitioner's] decision not to hire the discriminatees." Pet. App. 59a.

With respect to Palo Verde, the Board found that "there were hundreds of jobs that needed to be filled," Pet. App. 66a n.84, and that petitioner manipulated its hiring policy to ignore "the obvious source of qualified workers, the incumbent work force, and recruited from elsewhere in the country to avoid the risk of hiring organized craft employees," *id.* at 62a & n.69. With respect to Exxon, the Board observed that petitioner experienced persistent difficulty staffing the project with pipefitters, pipe welders, and electricians, *id.* at 42a, and that petitioner "never contended that there was not enough work at the project to hire the discriminatees," *id.* at 66a n.84. Rather, the Board explained, petitioner "relied on its 30 day rule to claim that their applications were never open when [petitioner] was hiring in their crafts." *Ibid.*

The Board found "abundant record evidence that [petitioner] both harbored animus and acted upon it," and determined that petitioner "engaged in a pattern of systematic discrimination intended to screen out union activists from consideration for employment." Pet. App. 60a. The Board explained:

> Hiring practices at both projects abounded with one-sided exceptions and disparities. Discriminatees were given different information and different opportunities to apply from applicants who had no discernable union activist leanings. The discriminatees were kept uninformed concerning vital hiring rules and threshold employment requirements, yet were held to the strictest standards of compliance. Although they submitted credentials that would have warranted inquiry * * * no discriminatee was interviewed or spoken to beyond perfunctory, and sometimes untruthful, statements. At the same

> time, applicants with weak or nonexistent union ties were courted, accommodated, and hired, even when they did not meet the [petitioner's] employment criteria. * * * [Petitioner] offered "no credible reasons" for these clear disparities. We * * * conclude * * * that [petitioner's] defenses are pretextual.

Id. at 63a-65a (footnotes omitted). In addition to relying on most of the ALJ's findings of antiunion animus (*id.* at 59a-60a & n.58), the Board observed that high-ranking corporate officers harbored the view that union organizers could not be loyal employees (*id.* at 60a-61a), and that corporate managers at both sites admitted petitioner's discriminatory intent (*id.* at 61a-62a).

Finally, the Board rejected petitioner's argument, based on the Sixth Circuit's decision in *NLRB* v. *Fluor Daniel*, 161 F.3d 953 (1998) (*Fluor Daniel II*), that the General Counsel failed to establish a violation of the NLRA "by failing to match each alleged discriminatee with an available job that he or she was qualified to perform." Pet. App. 66a. The Board explained that, here, unlike in *Fluor Daniel II*, the ALJ "expressly considered job availability and made factual findings that vacancies existed that the discriminatees were qualified to fill, and further, that over the life of both projects there were enough positions to have employed every discriminatee." *Ibid.* The Board observed that petitioner did not contend that "there was insufficient work to employ the discriminatees," but instead relied "on the defenses that we have found to be pretextual to explain its failure to hire them." *Ibid.*

The Board, in relevant part, ordered petitioner to "[c]ease and desist from * * * [d]iscouraging employees from engaging in activities on behalf of a labor

organization by refusing to * * * hire job applicants because they are members or supporters of unions, or because they indicate on their employment applications that they are voluntary union organizers." Pet. App. 69a.

4. Petitioner filed a petition for review in the court of appeals, and the Board filed a cross-application for enforcement of its order. The court of appeals denied the petition for review and enforced the Board's order in pertinent part. Pet. App. 1a-25a.

The court of appeals stated that, in refusal-to-hire cases, the General Counsel must show antiunion animus and a covered action such as "a particular failure to hire," an analysis that "requires the General Counsel to 'match[] up applicants with available jobs for which they are qualified.'" Pet. App. 10a. That requirement, the court explained, means that applicants "must be actually qualified for the respective job positions and that the job positions must be actually available." *Ibid.* The court held that the Board's approach in *FES* "fully addressed our concerns and set out a framework wholly consistent with our holding in *Fluor Daniel II*." *Id.* at 11a.

The court found that, in this case, the Board engaged in "precisely the type of detailed analysis required under our decision in *Fluor Daniel II*, as incorporated by the NLRB in *FES*." Pet. App. 13a. "With respect to the specific issue of job matching," the court explained, "the NLRB adopted the findings of the ALJ that Fluor Daniel was hiring during the time that the discriminatees applied and that the discriminatees were qualified." *Id.* at 12a. The court observed that the ALJ "undertook a detailed analysis of the discrimination at each of the work sites, noting names of applicants, the dates that they applied for positions or attempted to apply for

positions, the number of applicants actually hired by [petitioner], and the positions that were filled by [petitioner]." *Ibid.* The court agreed with the Board that, "[i]n contrast to *Fluor Daniel II*," the ALJ "expressly considered job availability and made factual findings that vacancies existed that the discriminatees were qualified to fill, and, further, that over the life of both projects there were enough positions to have employed every discriminatee." *Id.* at 12a (quoting Pet. App. 66a). The court thus held that the Board's findings and conclusions were supported by substantial evidence. *Id.* at 13a-14a.

Finally, the court rejected petitioner's argument that the Board failed to take into account petitioner's hiring rules—in particular, petitioner's hiring preference system and its 60-day rule. Pet. App. 14a. The court concluded that substantial evidence supported the Board's finding that petitioner "unlawfully applied its system of hiring preferences, policies, and procedures so as to refuse to consider or hire 120 voluntary union organizers." *Ibid.* (internal quotation marks omitted).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore unwarranted.

1. Contrary to petitioner's claim (Pet. 11-12), the decision of the court of appeals does not conflict with this Court's decision in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 400-403 (1983). In *Transportation Management*, this Court upheld, as a permissible construction of the NLRA, the Board's *Wright Line* burden-shifting approach in cases involving discharges and other adverse employment actions alleg-

edly motivated by union activity. Under that approach, the Board's General Counsel must first show that union activity was a motivating factor in an employer's decision to "discharge or [engage in] other adverse action" against a statutory employee. *Id.* at 401. Once that is established, the employer can avoid liability by demonstrating as an affirmative defense that it would have made the same decision in the absence of any protected activity. *Id.* at 401-402; see *Director, Office of Workers' Comp. Programs* v. *Greenwich Collieries*, 512 U.S. 267, 278 (1994) (reaffirming Board's approach as consistent with Administrative Procedure Act, 5 U.S.C. 556(d)).

The Board's *FES* test for refusals-to-hire, which it applied here and which the Sixth Circuit upheld, fully comports with the analysis in *Transportation Management*. The *FES* test requires the General Counsel to prove that antiunion considerations were a motivating factor in the employer's refusal to hire union-affiliated employees, by showing that jobs were available, that applicants were qualified, and that union animus contributed to the refusal to hire. If the General Counsel meets that burden, the burden shifts to the employer to establish that the applicants would not have been hired even absent their union affiliation.

The court of appeals determined that the General Counsel fully met his burden under *Transportation Management* of proving that antiunion sentiment contributed to petitioner's hiring decisions. The court pointed to the Board's "detailed analysis of the discrimination at each of the work sites," including its examination of evidence concerning all applications, the number of positions filled and applicants actually hired, and the qualifications of the union applicants, which supported the conclusion that "vacancies existed that the discriminatees were qualified to fill, and further,

that over the life of both projects there were enough positions to have employed every discriminatee." Pet. App. 12a-13a (quoting Pet. App. 66a). The court also discussed the Board's analysis of evidence showing petitioner's extraordinary efforts to avoid hiring available union applicants, and determined that substantial evidence supported the Board's finding of numerous deviations from petitioner's hiring policies. *Id.* at 13a, 14a-17a, 21a-23a.

Finally, the court concluded that substantial evidence supported the Board's findings that petitioner not only harbored animus against union-affiliated applicants, but also used its hiring policies as a pretext for discriminating against the union applicants. Pet. App. 14a-17a, 20a. In those circumstances, petitioner errs in asserting (Pet. 11-12, 14) that the court of appeals and the Board "eased the burden on the General Counsel to showing nothing more than anti-union animus." Both the court of appeals and the Board found that petitioner had in fact adopted a policy of discrimination with respect to hiring decisions.

Petitioner argues (Pet. 11) that the court of appeals' decision conflicts with *Transportation Management* because the court failed to require the General Counsel to "identify the specifically available job" for each applicant, "so that an initial determination [could] be made as to whether a hiring decision actually occurred and, if so, a proper comparison [could] be made to determine respective qualifications." *Transportation Management*, however, did not address the requisite level of specificity of evidence that antiunion animus caused injury to employees "in regard to hire." 29 U.S.C. 158(a)(3). And in any event, the court of appeals correctly read both its precedent and the Board's *FES* decision to "require that the General Counsel make

specific findings both that jobs were available at the time of the alleged discrimination and that [the] discriminatees were qualified for the jobs." Pet. App. 11a. In finding causation, the court of appeals held that the Board engaged in an appropriate analysis of job matching by finding that openings existed during the time that the discriminatees submitted, or attempted to submit applications, that the discriminatees were highly qualified to fill those job openings based on their resumes and experience, and that over the life of both projects there were sufficient positions in the relevant job categories to have employed every discriminatee. *Id.* at 9a, 12a-14a.[4]

Petitioner wrongly argues (Pet. 16) that the court of appeals and the Board determined job availability based solely on the number of positions petitioner filled over the course of the two projects. To the contrary, the court and the Board both relied on record evidence that petitioner filled positions in all crafts performed by the union applicants, and that, over the course of both the Exxon and Palo Verde jobs, petitioner had great difficulty filling those positions and went to substantial lengths to fill them with individuals other than the union applicants. Pet. App. 12a-17a, 37a-46a, 52a-57a. There also is no merit to petitioner's related argument (Pet. 17) that the Board failed to make the "critical finding * * * that the applicants had valid, *active* applications on file at the time of the need for these positions." The court of appeals upheld the Board's

[4] Petitioner asserts (Pet. 18) that the record fails to show the qualifications of eight applicants for positions at Palo Verde. The record, however, shows that like all other applicants for positions at Palo Verde, those eight applicants had previously worked at the Palo Verde plant for Bechtel, a showing that established their qualifications. Pet. App. 12a, 50a-51a.

finding that petitioner used its hiring policies, including its policies with respect to active applications, as a pretext for discriminating against the union applicants. Pet. App. 14a-17a, 61a, 62a-65a.

Contrary to petitioner's argument (Pet. 20), the language of the statute does not mandate a more individualized matching of jobs and applicants than was required by the court of appeals. The statute generally prohibits discrimination "in regard to hire." 29 U.S.C. 158(a)(3). That language plainly permits the Board's conclusion that such discrimination was established where the record demonstrated that all discriminatees were qualified for available positions, that petitioner filled enough positions to have employed every discriminatee, and that petitioner's refusal to hire those applicants was based on discriminatory animus.[5]

2. Contrary to petitioner's argument (Pet. 12-13), there is no conflict between the decision below and decisions of other courts of appeals.

Petitioner's claim (Pet. 12) that the court of appeals' decision conflicts with that court's own prior decision in *Fluor Daniel II* is misplaced. As an initial matter, the alleged intra-circuit conflict would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the two decisions are not in conflict. The court's decision here (which reflects the views of two judges who also joined

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[5] For similar reasons, there is no merit to petitioner's claim (Pet. 20-21) that it was denied due process because the Board "impose[d] liability without the necessary finding of a statutory violation." The court of appeals correctly held that the causation requirement of Section 8(a)(3) was met, and that, under *Transportation Management*, petitioner had ample opportunity to "avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation." 462 U.S. at 401.

the decision in *Fluor Daniel II*) specifically concludes that "the NLRB in *FES* fully addressed our concerns and set out a framework wholly consistent with our holding in *Fluor Daniel II*." Pet. App. 11a. Moreover, the court held that the Board properly applied that framework here by engaging in a detailed analysis of the qualifications of applicants, the jobs that were open at both sites, and the time periods during which those openings were filled. *Id.* at 11a, 12a-14a.

There is no merit to petitioner's claim (Pet. 13) that the court of appeals' approach conflicts with *Starcon, Inc.* v. *NLRB*, 176 F.3d 948 (7th Cir. 1999), a pre-*FES* case. Although the Seventh Circuit in *Starcon* criticized aspects of the Board's pre-*FES* approach in refusal-to-hire cases, that court, like the Sixth Circuit here, has subsequently approved the Board's *FES* standard in refusal-to-hire cases. See *Masiongale Elec.-Mech., Inc.* v. *NLRB*, 323 F.3d 546, 552-555 (7th Cir. 2003).

There also is no conflict between the court of appeals' decision and *Ultrasystems Western Constructors, Inc.* v. *NLRB*, 18 F.3d 251 (4th Cir. 1994). See Pet. 12. In *Ultrasystems*, the ALJ had found that the employer had refused to *consider* certain union applicants; and the court of appeals held that the Board could not order the employer to *hire* those applicants unless "the refusal to consider also results in an actual refusal to hire." 18 F.3d at 259. That issue is distinct from the issue in this case concerning whether the Board reasonably concluded that petitioner unlawfully refused to hire known union affiliated applicants. See Pet. App. 58a (finding that petitioner "refused to consider *and hire* the discriminatees at Exxon and Palo Verde because of its unlawful antipathy to their union status") (emphasis added); *id.* at 98a (ALJ finding that "union

affiliated applicants for employment [at Palo Verde] were *denied hire* because of their union affiliation") (emphasis added); *id.* at 107a-108a (ALJ concluding that union-affiliated applicants at Exxon "were *denied hire* because of their membership in the union") (emphasis added). See also *FES*, 331 N.L.R.B. at 12, 15 (distinguishing refusal-to-hire and refusal-to-consider contexts).

Finally, petitioner's claim of a conflict among the courts of appeals is undermined by decisions since the Board's *FES* decision that either expressly uphold the *FES* framework or uphold the Board's application of that framework. See *NLRB* v. *Interstate Builders, Inc.*, 351 F.3d 1020, 1035-1037 (10th Cir. 2003); *Masiongale Elec.-Mech., Inc.* v. *NLRB*, 323 F.3d at 552-555 (7th Cir.); *Casino Ready Mix, Inc.* v. *NLRB*, 321 F.3d 1190, 1194-1199 (D.C. Cir. 2003). See also *Wolfe Elec. Co.*, 336 N.L.R.B. 684, 690 (2001), enforced, 314 F.3d 325 (8th Cir. 2002); *Little Rock Elec. Contractors, Inc.*, 336 N.L.R.B. 146 (2001), enforced, 50 Fed. Appx. 570, 576 (4th Cir. 2002) (per curiam); *Moses Elec. Serv., Inc.*, 334 N.L.R.B. 567 (2001), enforced, No. 02-60016 (5th Cir. July 15, 2002) (per curiam) (unpublished). Cf. *NLRB* v. *Pneu Elec., Inc.*, 309 F.3d 843, 857-858 (5th Cir. 2002) (post-*FES* decision upholding Board's finding of unlawful refusal to consider union applicants under either *FES* or *Fluor Daniel II*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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